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Lord Justice Birkett's Address at Annual Dinner

The Right Honorable Lord Justice Birkett, Lord Justice of Appeal, Royal Courts of Justice, England, was the principal speaker at the Annual Dinner of the American and Canadian Bar Associations during the Annual Meeting in Washington. The theme of his address was the relation of law and literature. Sir Norman reminded the assembled lawyers of the two nations that "great advocacy is in the last analysis the product of what the man is who produces it". And though conditions have changed in our day, he went on, an advocate who would become a master of the art of persuasion must be able to use the right words in the right order—and this mastery he cannot acquire merely from reading the Revised Statutes of Indiana. The address is published in this issue. (Page 891.)

Canadian Bar President Discusses Administration of Justice

President A. N. Carter of the Canadian Bar Association chose "Some Merits and Defects of the Administration of Justice in Canada" as the subject for his Annual Address, delivered this year to a joint session of the Canadian and American Bar Associations in Constitution Hall at Washington during the joint Annual Meeting. He selected this topic because this year, for the first time, the Canadian Supreme Court has become the court of final appeal in Canada in place of the Judicial Committee of the Privy Council. The address, which is published here, stressed some of the problems of the Canadian lawyers. (Page 895.)

Harold J. Gallagher Calls for a Nonpartisan Judiciary

During the last seventeen years, 75 per cent of all the judges now sitting on the Federal Bench have been appointed, Mr. Gallagher says, and there have been too many occasions when judges have been selected because of political considerations. This article is taken from the address Mr. Gallagher delivered before the Section of Judicial Administration at the Annual Meeting in Washington. He declares that the great need at all times is for a nonpartisan or bipartisan judiciary, and that judges and lawyers alike must respond to the call to duty to protect the independence of the courts. (Page 900.)

Leonard W. Brockington Defines Tie Between Canada and the United States

When he addressed a joint meeting of the Canadian and American Bar Associations last month, Leonard W. Brockington remarked that probably only as allies on the field of battle had so many Canadians and Americans gathered together at one time and place before. In his address, he stressed the friendship between the two North American neighbors of which the joint Annual Meeting was a symbol. He called upon them to put on "the armor of that supreme courage, the undying faith, the unshaken hope" in the "mists of uncertainty which dim our eyes" and "the clamor of recriminating ideologies which deafens us". (Page 904.)

Chief Justice of Nebraska Asks, Do We Want What They Have?

The Constitution of the Union of Soviet Socialist Republics "recognizes" freedom of religious worship, and declares that freedom of speech, freedom of the press and freedom of assembly are "guaranteed by law". Chief Justice Robert G. Simmons of the Nebraska Supreme Court says that the trouble with these familiar-sounding phrases is that the Soviet meaning of them is vastly different from our own. His article quotes Foreign Minister Vishinsky's interpretation of the rights guaranteed by the Soviet constitution in seeking an answer to the question, "Do we want what they have?" (Page 909.)

Visit of Japanese Judges Is Described

The new Japanese constitution sets up the judiciary as a separate and equal third branch of government for the first time in the history of that country. The Japanese Supreme Court has now become the real guardian of the new constitution. James Perkins Parker writes of the visit of seven Japanese judges to the United States to study the workings of our judiciary under the auspices of the Department of the Army and the Supreme Commander for the Allied Powers in the Far East. (Page 916.)

Proceedings of House of Delegates Reported in Detail

The House of Delegates of the Association held six sessions at the 1950 Annual Meeting in Washington in September. In accordance with the JOURNAL's custom, this issue contains a detailed account of the debates and actions of the House. A similar report of the proceedings of the Assembly will appear in a later issue. (Page 948.)

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Law and Literature:

The Equipment of the Lawyer

by **The Right Honourable Lord Justice Birkett** • Lord Justice of Appeal, Royal Courts of Justice, England

▪ This is Lord Justice Birkett's address at the Annual Dinner of the American and Canadian Bar Associations delivered on the evening of September 21, 1950, at the National Guard Armory in Washington. Lord Justice Birkett told his listeners that despite the change in emphasis in our day upon the function of the advocate, his thirty-five years at the Bar and on the Bench have proved to him that the affinity between law and letters is very close, and that to acquire the "mighty weapon of the well-stored mind", the lawyer must resort to wide reading, for in the realm of books he will find that which exists nowhere else.

▪ It was Dr. Johnson who once observed "To those who have been much together, everything heard, and everything seen, recalls some pleasure communicated or some benefit conferred". And I cannot renew this happy and fraternal association without acknowledging with a full heart, the lasting pleasure communicated, and the inestimable benefit conferred upon me, by the fortunate circumstances which first brought me across the Atlantic many years ago. It has been my good fortune to come to you on so many occasions now that the immigration authorities are beginning to look upon me with a little suspicion. Those of you who are familiar with the great lines of Emma Lazarus engraved on the Statue of Liberty may recall that they conveyed a warm-hearted invitation to come to these shores to all those who were unfortunate enough to be poor. Coming from England at this time, I should have thought my qualifications in that respect, at least, were beyond any challenge; and I anticipated that I should easily pass through what Emma Lazarus poetically called "The Open Door". But the immigration authorities, somehow, don't seem to know about Emma Lazarus. It does not appear to satisfy them when I state in writing that I am quite content with one wife, and that I have no intention of trying to embarrass either President Truman or Mr. Acheson. When they interrogate me, as they do, about the purpose of my visit, and I reply that my simple purpose is to bring a message of great good will from the Bench and Bar of England, their suspicions deepen visibly. The art of cross-examination is then seen at its best—acute, incisive, pungent and excessively unbelieving. When, under pressure, I deviate a little from the strict truth in my answers, I comfort myself with the observation made by Chief Justice Richardson a couple of centuries ago. When a disappointed litigant threw a book at his head as he was bending low over his desk, he straightened himself and said: "Now, had I been an upright judge I should have had it."

But, Mr. President, having survived that ordeal once more, I think that this joint meeting is perhaps the most memorable gathering in all the experience of the two Associations. One tiny fear still assails me. In the criminal courts of England, we are still governed by the Criminal Procedure Act of 1865 which allows a witness to be confronted with a statement made on a former occasion inconsistent with his present testimony. I have no particular fear of this, because on all my visits whether in war or peace, I have had virtually one theme only, and that was to say in one form or another that the best and surest hopes of all mankind lay in the closest alliance of our three great countries.

But there is some danger, perhaps, that I might say something tonight that I have said before either in America or Canada, and I have debated with myself whether I ought not to begin, as a young and brilliant friend of mine began a lecture the other night in London to a most distinguished audience by saying: "Ladies and Gentlemen, I have delivered this lecture once before. It was to the prisoners in His Majesty's prison at Pentonville. I must therefore apologize in advance if any of my hearers have heard me before."

History Is a Register of Mankind's Follies

But, Mr. President, I feel I need make no apology tonight if I say

just one prefatory word on that theme of former addresses. When I first spoke at Indianapolis under the presidency of my good friend, Mr. Jacob Lashly, I like to recall that I spoke of the ties that bound us one to another—ties of blood, of language, law, and literature, and our unsleeping love of liberty—ties that have become immeasurably dearer since that night in the James Whitcomb Riley room, and are now sealed with the outpourings of our blood and treasure. It was Gibbon, of course, who said that "History is indeed little more than the register of the crimes, follies, and misfortunes of mankind".

The state of the world today gives a terrible and tragic force to it. All over the face of the earth there spread the dark and forbidding clouds of anxiety and apprehension. It is a great and an inspiring thing for an Englishman to come to this great country, conceived in liberty, to which all the nations who love that selfsame liberty turn in their distresses, and to this great gathering of American and Canadian lawyers. My own country, weakened and exhausted by the great exertions of war, will have reason to be grateful throughout its subsequent history for the understanding, the insight, the humanity, and the practical help so freely given by America, and by the loyal and magnificent support of Canada in every time of need.

Our purposes are the same; the ideals we cherish are the same; for in all our countries there is to be seen in the development of our institutions and particularly in the development of our law, sometimes confused and hesitating, but always there, the passionate attachment to freedom of speech and thought, based on the sure belief that only by such freedom can the mind of man itself develop and display its finest powers. In the year I spent at Nuremberg I saw with clear eyes the disaster which finally overcomes a great nation and a great people when the rule of law is disregarded and justice is set at naught. In the place of law, fear reigned; where justice had been, tyranny reared its menacing head. The courts were mere registering instruments of a dictator's will. The judges were the tools of the executive. The secret police were a law unto themselves. There was no place for the fearless advocate, no place for the fair trial, no place for the semblance of justice.

We Must Dedicate Ourselves to Preservation of Liberty

It is altogether right and proper therefore that in these troubled days of ours, we should reflect for a moment or two in all our deliberations on the great blessings we are so apt to take for granted—the supremacy of law and the freedoms which spring therefrom, and to dedicate ourselves afresh to the work of seeing that they do not perish from the earth.

Now, Mr. President, I have thought that I could best serve the interests of your two Associations if I forbore to speak further on the state of the world and devoted myself to some considerations affecting the lawyer's life and work, that might serve as a relaxation and possibly be of interest and value.

Thirty-five years' experience of the Bench and Bar of England have confirmed me in the view that the profession of the law, despite all its detractors, is one of the most honorable and dignified and responsible callings to which a man can consecrate his life, and that the true exercise of the profession demands that such a man should be very much more than a mere man of law. I do not wish to be understood to mean that all lawyers should engage in what Lord Morley once called "the eager and tumultuary pursuits of the life political". As one of our more daring counsel in England once said to a judge who had refused the postponement of a case to a rather distant date on the ground that all the judges on the Bench might be dead by then, "My Lord, that would be too much to hope for."

Lawyers Must Have Wider Outlook than Law

Many lawyers, particularly in America and in Canada, do take commanding positions in public life and therefore bring luster and prestige to the profession, and it is well that this should be so; but what I am to commend to you is that the lawyer in fitting himself for the work of the profession and in its practice should aspire to the wider outlook, the loftier range than the study of the law, by itself, can ever give. One of the greatest of the American Chief Justices, John Marshall, was of the opinion that no lawyer is justly entitled to the honorable and conventional title of "learned", if his learning is confined to the statutes and the law reports.

John Marshall was a great man of law and the value of the opinion I have quoted derives from that very fact; but he was also a considerable man of letters. It was from that wider field that he drew the strength and the inspiration and the judgment that make him a great figure not only in this country, but wherever lawyers foregather. In the course of his professional life the lawyer finds that he is called upon to deal with almost every form of human activity; and every form of knowledge, therefore, is of immense value to him. Not infrequently he will find that into his hands have been confided all that his clients deem to be most precious—reputation, property, even life itself—and it will be his duty to defend those rights and liberties from whatever quarter they may be assailed.

In his address to the Stanford University Law School, Mr. Justice Jackson, whom I am very proud and honored to call my friend, recently gave it as his opinion that while the scholarship of the Bar had been improving, the art of advocacy had been declining. Having spent the best part of my life in the exercise of the art of advocacy I should view any such decline with the very greatest regret. When I was first beginning at the English Bar, Edward Carson was at the height of his power. With his rich Irish brogue and his command of pathos he could move an English jury almost to tears.

Indeed he could reduce himself to tears at times, and on one such occasion, Tim Healy, his opponent, himself exercising one of the weapons of the advocate, said to the jury, "When I see my learned friend in tears, I reflect that it is the greatest miracle that ever happened since Moses struck the rock in the wilderness." I was myself in the chambers of the great Marshall Hall and I shall always remember that tremendous scene in court, in a great and dramatic murder case, when, speaking to the jury of the irrevocable effect of their verdict, he quoted from *Othello*:

> Put out the light, and then put out the light:
> If I quench thee, thou flaming minister
> I can again thy former light restore
> Should I repent me; but once put out thy light
> Thou cunning'st pattern of excelling nature,
> I know not where is that Promethean heat
> That can thy light relume.

There can be no doubt, I think, that the outward form of advocacy has undergone great changes, but I think it will always be one of the matters to which the profession would do well to give the closest attention. And if some of the younger members of the profession when reading the speeches of great advocates are apt to wonder wherein their power resided, it should be remembered what the younger Pitt once said when somebody expressed wonder at the enormous reputation of Charles James Fox: "Ah! But you have never been under the wand of the magician." The elements of advocacy are many—the advocate himself with his quick mind and understanding heart, his power of expression, his readiness and resource, his courage, the occasion with all its dramatic possibilities, the theme whether noble and lofty or tragic and pitiful, the form and manifestation of all these things—but my own view born out of a lengthening experience is that the most important element in advocacy is the man himself.

Sport & General

The Right Honorable Lord Justice Birkett, Lord Justice of Appeal, Royal Courts of Justice, England. Sir Norman became Lord Justice of Appeal a few days before his arrival for the recent Annual Meeting in Washington. This photograph was taken on October 2, when he appeared for the first time in his robes as Lord Justice of Appeal. The occasion was the traditional service at Westminster Abbey.

Nature and Quality of Lawyer Determine His Success

Knowledge of the law and assiduous training in its growing complexities is essential to any kind of success in the profession; but in the last resort everything depends upon the nature and quality of the man. The first Lord Rosebery, himself a great master of the written and spoken word, said of the oratory of Chatham:

> Assiduous study of words, constant exercise in choice language so that it was habitual to him in conversation, and could not be other than elegant in premeditated speech, this combined with poetical imagination, passion, a mordant wit, and great dramatic skill would seem to be the secrets of Chatham's oratorical supremacy. And yet it would be safe to say that a clever fellow who had mastered all these would produce but a pale reflection of the original. It is not merely the thing that is said *but the man who says it that counts*, the character that breathes through the sentences.

And James Russell Lowell, when speaking of the magic of Emerson, expressed the same view:

> Those who heard him while their natures were yet plastic, and their

mental nerves trembled under the breath of divine air, will never cease to feel and to say:

"Was never eye did see that face
Was never ear did hear that tongue,
Was never mind did mind his grace
That ever thought the travail long:
But eyes and ears and every thought
Were with his sweet perfections caught."

It would be unreasonable to expect the same excessive care to be given to the art of advocacy in the present age as was bestowed upon it when the world was very much different. Both the Greeks and the Romans paid the very greatest attention to it. They ranked it with poetry, painting and sculpture in the pains taken to reach perfection. If advocacy can be taught, the ancient writers supply a complete code. Over eighteen centuries ago, Quintilian was discussing with amazing insight the qualities to be cultivated by the advocate in the exercise of his calling.

For example, it was he who pointed out the inestimable advantage of knowing your judges. He said: "For it will be desirable to enlist the temperaments of the judges in the service of our cause, where they are such as are likely to be useful, or to mollify them when they are likely to be adverse, just according as they are harsh, gentle, cheerful, grave, stern or easy-going." Could anything have been more tactfully expressed? The tradition that the advocate should try to laugh naturally or at least to smile appreciatively when the judge makes a joke, however feeble, is a survival of the teaching of Quintilian! Lord MacMillan, whose collection of essays *Law and Other Things* should be on every lawyer's bookshelves and to which I am so deeply indebted now and at all times, has developed this theme with his accustomed brilliance.

The Emphasis Has Changed in Our Day

But fashions change, manners change, all things change; and there has been a change in emphasis in our day. The spread of education, the astonishing development of journalism, the coming of the radio with its own special technique for public speaking—all in some measure have contributed to the decline of which Mr. Justice Jackson spoke.

But how rich are the rewards for care and pains in the art of advocacy may be seen, for example, in the speeches of Mr. Churchill during the last war. For let nobody suppose that those speeches were made without immense preparation and the care that ever Demosthenes gave to his orations, for of him it was said "he adopts no thought at random, but takes much care of both the arrangements of his ideas and the graciousness of his language". In the speeches of Mr. Churchill were to be seen thought and character inextricably intertwined, the man himself, and all that his experience and training had made him. There was the unrivalled power of exposition, the gift of enthralling narrative, and there of course was the noble and adequate theme and the sincere and impassioned mind which produced the eloquence that nerved the arm and fortified the heart.

It is true that the advocate is not likely to tread so exalted a stage; but the advocate can at least take notice of the exceeding great rewards which attend the pains taken in the preparation of anything he has to say in court or elsewhere. Great advocacy, I contend, is in the last and supreme analysis, the product of what the man is who produces it, and the plea I therefore venture respectfully to make is that the lawyer when devoting his life to the law, indeed consecrating his life to the law, should enlarge the sweep of his mental vision so that nothing that is human, or that affects humanity, should be to him common or unclean.

Affinity Between Law and Letters Is Very Close

Now with this in mind, I would ask you for a moment to look with me at the relation of law to literature. If the advocate is to add to his purely legal equipment, the mighty weapon of the well-stored mind, knowledge of every kind cannot be too highly commended, and for my own part I believe that from wide reading in the realm of books comes something not to be acquired elsewhere. The affinity between law and letters is really very close. In that moving and memorable conversation between Johnson and Jonathan Edwards, recorded by Boswell, Johnson said: "You are a lawyer, Mr. Edwards. Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants." This famous and much-quoted passage conveys the impression that lawyers and bookish men are in some degree opposites; the lawyer concerned only or mainly with the mundane and practical affairs of the world, the bookish man immersed wholly or mainly in the world of ideas. The contrast is quite false and fantastic.

The association between books and lawyers has always been of the closest kind. It would not be too much to say that in the purely professional sphere of the law, or at the very least, in some portions of it, the work of the law is inextricably bound up with the world of books.

The lawyers of fiction who have become national characters are not perhaps very many, but Counsellor Pleydell in Scott's *Guy Mannering* is surely one of them. You will remember what he said when showing Colonel Mannering around his chambers in the High Street in Edinburgh. Pointing to the books on his shelves, described as the "best editions of the best authors" and in particular "an admirable collection of the classics", he said: "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect."

Lincoln Is Perfect Example of Lawyer as Literary Craftsman

But the great figure of Abraham Lincoln provides the perfect example of my theme. His place in his-

(Continued on page 946)

The Administration of Justice in Canada: Some Merits and Defects

by **A. N. Carter, K. C.** • President of the Canadian Bar Association

▪ This year is an important one in Canadian legal history. For the first time, the formal bond between the laws of England and the laws of Canada has been severed by abolition of appeals from Canada to the Judicial Committee of the Privy Council of the Parliament of Great Britain. The Supreme Court of Canada has been established as the final court of appeal in Canada. In his Annual Address, delivered to a joint session of the Canadian and American Bar Associations during the joint Annual Meeting in Washington, President Carter of the Canadian Bar took this opportunity to examine some of the merits and defects of the administration of justice in his country.

▪ Your law as ours is a law of liberty because it secures to each individual personal freedom—the right of each one of us "to think what he will, to say what he will and to go where he will on his lawful occasions without let or hindrance from any other persons". Those are the words of Lord Justice Denning in his recent book *Freedom under the Law* and he states as the indispensable conditions of personal freedom that "The executive government must never be allowed more power than is absolutely necessary. They must always be subject to the law; and there must be judges in the land who are no respecters of persons and stand between the subject and any encroachment on his liberty by the executive".

It is right that we should remind ourselves of these fundamental articles of our political and legal creed for they are challenged and threatened today by an alien conception which magnifies the power and the importance of the State, belittles the individual, disregards his liberty and recognizes not the rule of law but the arbitrary will of men.

We Take Personal Freedom for Granted

It is not my purpose to make more than a passing reference to this theme which at present is so much in our minds and so close to our hearts. This I must say, however: Personal freedom, freedom of mind and conscience, limitations on the powers of the executive, the subjection of the executive to the ordinary law and the fearless impartiality and independence of judges we take for granted. They are as familiar to us as the air we breathe, and have been for hundreds of years to those who have lived in our favored countries. But we must remind ourselves that arbitrary rule has always existed, has always looked with jealous and hostile eyes on our creed of freedom under the reign of law, and at present is used by the totalitarian states with a ruthless severity never surpassed. In time of war we limit to some extent in the interest of national safety the freedom of the individual, but what is with us an exceptional measure is with them the normal rule.

Let me illustrate by examples the contrast between our creed of individual freedom under the law and the doctrine of state aggrandizement by the uncontrolled will of men. Think of living in peacetime in a country that authorizes the detention of persons "who are a danger either by reason of their dangerous associations or by reason of their previous activities". That is what Article 7 of the Code of the Soviet Union provides. Or think of being liable to be called to account as a criminal, not for any specific offense, but for any act which in the opinion of the judges is "socially dangerous"! That is the effect of Article 16 of the Soviet Code, and it is the logical outcome of their basic view that the interests of the State, which in fact means the dominant party in the State, are paramount and the rights of the individual unworthy of protection or regard. Our judges, acting primarily through the writ of *habeas corpus,* protect the private person from any interference with his personal liberty which is not allowed by law. How different again is the rôle allotted to the judges of the Soviet! Mr. Vishinsky describes

it in his book on *Penal Procedure*, where he says that the Soviet judge "must not aim solely at legal logic; he must always bear in mind that the law is nothing but the expression of party policy; in practice this means that the Soviet judge, in case of any conflict between the law and the general party line, must unhesitatingly reject a strict application of the law—to which we have seen that he is not after all strictly bound—in order to give absolute obedience to the party directions which represent, for him, the supreme law". It would be idle to add anything to this passage for no words could reveal more clearly the immeasurable gulf between our conception of justice under the rule of law administered by impartial and independent judges, and the Soviet idea of justice which ignores the rights of the individual and uses the judges merely as tools to carry out the will of the oligarchy who are the State.

Although I could not refrain from touching on this timely and absorbing subject I shall not develop it further. That I shall leave to others who will speak with greater authority.

Canada Has Embarked on Important Legal Venture

As my main theme I have chosen "Some Merits and Defects of the Administration of Justice in Canada". It is an ambitious subject for a short address, but I am moved to adopt it because this year we as Canadians are embarking on a legal venture of profound importance. For the first time in our history we have severed the formal bond that has kept our system of laws in such close relationship with the laws of England. I refer, of course, to the abolition of appeals from Canada to the Judicial Committee of the Privy Council and to the establishment of the Supreme Court of Canada as the final court of appeal. In doing so we have discarded the services of one of the greatest legal tribunals in the world, and for the future will rely on the learning and wisdom of our own judges for determining all questions of law, public and private. Surely this is a moment appropriate for us to take stock and to review briefly the strong and the weak features of our system of administration of justice. For it must be our aim to retain the strong and correct the weak.

What I shall say about the merits of the Canadian system of courts and jurisprudence may appear too obvious for statement. But, believe me, they are not inevitable and they are of fundamental importance.

Supreme Court of Canada Is Court of Final Appeal

Although we have a division between federal and provincial courts the line of demarcation is clearly defined and there is seldom resulting conflict. In the federal court, which is the Exchequer Court of Canada, are determined all causes to which the Dominion is a party and the vast majority of patent and copyright matters and cases in admiralty. All other causes, civil and criminal, originate in one or other of the courts of the ten provinces. The final court of appeal from all courts, federal and provincial (subject to certain exceptions where the issue raised is small in amount or involves no important matters of law), is the Supreme Court of Canada. This unified system of courts with one final court of appeal ensures the development of an orderly and coherent system of Canadian law, due regard being paid, of course, to the causes which arise in the Province of Quebec and are subject to the Civil Code of that province. That this good feature of the Canadian legal system deserves emphasis is shown by the fact that only recently in one of the nine common law provinces the suggestion has been made that the jurisdiction of the Supreme Court of Canada be limited to constitutional cases and to certain appeals in criminal cases. By resisting at the outset such a backward step we can ensure the development of a unified system of Canadian jurisprudence such as we have now and one of unimpaired quality.

Only by casting our minds back to earlier stages of our legal history can we assign a proper value to a sound code of legal procedure. Such codes we are fortunate in having developed throughout Canada in the federal and provincial courts and in both civil and criminal matters. They possess exemplary virtues for they are simple, direct, free from technicalities and are designed to limit judicial inquiry to the merits of the matter in hand. Under them, appeals to be successful must be directed to cardinal issues: new trials are rarely ordered. These systems of procedure we are inclined too readily to take for granted, and it is well to recall occasionally how indispensable they are to the sound administration of justice and how necessary it is to safeguard them at all costs and ever to be alert for their improvement. Improvement of legal procedure in Canada raises little difficulty, for generally control over its amendment has been delegated to rule-making committees consisting of judges or specially qualified members of the Bar, sometimes acting together, and in conjunction in some instances with the Executive. The results have been most satisfactory. Rarely, in the common law provinces at least, do we hear criticism directed against our procedural processes.

Canadian Law Developed in England

In commenting on the substantive law in Canada I exclude those portions of the law of the Province of Quebec comprised in the Civil Code which is based on the Code Napoleon and embodies the principles of the Roman law. The remainder of Canadian law, except as modified by statute, is the law developed by the English courts, and much of Canadian statute law is based directly on the statute law of England. Thus the great sections of the law of contract, which comprise so much of the law governing commerce, the law of wrongs, of trusts and general equitable principles, much of our

company law, and all our law of admiralty are law developed in England. Canadian criminal law, although it has been codified for nearly sixty years, follows closely the English law on which it is founded. Pick up any report of cases decided in one of the common law provinces, or on appeal to the Supreme Court of Canada, and you will find the basic principles generally supported by the citation of English authorities.

That the law of Canada should have been so closely modelled on that of England is natural. Our development as an important commercial and industrial country has taken place largely during the last fifty, and especially during the last twenty-five years. England has been a leader in commerce, in industry and world trade for centuries and has developed a system of law governing these great fields of activity which we Canadians have been well advised to adopt as our own. The Judicial Committee of the Privy Council as the final court of appeal in all civil cases until 1950 and in criminal cases until 1931 has been a powerful agency in maintaining and influencing the close similarity between the legal systems of Canada and England, and in establishing for us matured and tested legal rules and principles that have been adapted by statute to our special needs.

I should invite criticism if I included among the merits of the administration of justice in Canada the existence of a strong and well qualified Bar. That I shall leave to some competent but less prejudiced observer. What I can say firmly and with pride is that Canadian lawyers are subject to a rigid code of professional behavior, that they observe the code in the spirit as in the letter and that its rules are firmly enforced by the members of provincial Bars who are charged with that duty. They enjoy the benefits of being self-governing bodies with inclusive and compulsory membership in each province.

A. N. CARTER, K.C.
President of the Canadian Bar Association

Legislature Develops Law Rather than Courts

We have been fortunate in Canada, too, in the establishment of a tradition that has looked in the main to the legislatures rather than to the courts for the development of the law to meet novel conditions. Inevitably, under our federal constitution uncertainty has arisen on many occasions as to the competent legislative authority to deal with a particular subject matter, but the courts have interpreted the statute which allocates legislative authority, the British North America Act, as a statute and have thus given certainty to our basic law at the sacrifice, of course, of elasticity. To lawyers who must advise clients certainty is the great virtue.

These are the prime merits, as I see them, of the administration of justice in Canada. It is but right, now that the legal connection between our courts and those of England has been severed, that we—especially those of us who practice in the common law provinces—should acknowledge our great debt to English example and guidance for these merits. Our procedure in the nine common law provinces owes much to the series of reforms that were carried out in England principally between 1826 and 1874; the basic substantive law of the common law province is the law of England; the traditions of our Bars and the method of control over members are similarly derived, as is our disposition to rely on the legislatures not the courts for the adjustment of the law to meet changing conditions.

When we consider the defects of the administration of justice in

Canada we must do so with full regard for present day conditions. Today we have democracy not only in form but in fact. This is the century of the common man. Political power is being used for the immediate advantage of the less well-to-do; whether it is for their ultimate advantage is a large question about which we may well differ, but with which at this moment we are not concerned. There has resulted a great increase in the activities of government; large fields formerly occupied and controlled by private business or by individuals have been invaded and overrun by government agencies, and many functions heretofore performed by the legislature and the courts are now discharged by the Executive or bodies appointed by the Executive.

Canadian Lawyers Must Mend Their Ways

If this process is not to be extended further in Canada, Canadian lawyers must mend their ways. Today our courts suffer by comparison with administrative Boards in respect of expense and delay. The man in the street cannot fail to be impressed by the promptness and cheapness with which cases are decided by workmen's compensation boards, rental tribunals, labor boards, boards of public utilities and other quasi-judicial bodies; and they look with dissatisfaction on the delays and expense that mar judicial procedure. Too often the business man concludes that he cannot afford the time or the money to engage in litigation, and resorts to a settlement of his controversy or to arbitration.

How to meet this criticism does not admit of a simple or ready answer. In Canada I am convinced that the remedy lies not in reform of court procedure, which in the main is satisfactory, but rather in the reform of those who man and serve the courts. Undoubtedly there are judicial districts that are undermanned, but Canada with its 293 supreme and county court judges and its population of 13,500,000 cannot be said to lack judges when in England there are 104 such judges for a population of 48,000,000. What is needed is that we practitioners bring our cases to trial quickly and that the courts render their judgments promptly. This means a reform in lawyers' habits and the manning of the courts by the most competent members of the Bar. It should be a high obligation, too, for members of the Bar to accept, if offered, judicial preferment appropriate to their standing in their profession.

What I have urged is no light matter but one of pressing concern. Already large portions of the law have passed from the courts to administrative tribunals. There is a strong suggestion that cases arising out of the operation of automobiles, which form so large a part of a modern court calendar, should be determined by administrative tribunals. The suggestion cannot fail to receive support, if it will lead to prompt decisions at small expense, and if such cases are so treated other types of action will follow. I make no apology, therefore, for my warning and my exhortation, unwelcome though they may be.

Immunity of Crown from Suit Should Be Removed

By reason of the widespread extension of the activities of governments the large immunity from action which the Crown enjoys at common law works much hardship and must be modified. The injustice of the common law rule has been alleviated by the Dominion but only to a limited and inadequate extent. The law of both the United States and Great Britian now allows actions against the Government, and it is to be hoped that the Dominion and all the provinces of Canada will follow these enlightened examples. Whatever foundation there was originally for the immunity of the Crown has long disappeared and today, when governments engage in large businesses and carry on vast public works, it is intolerable.

The widespread delegation by the Dominion Parliament and provincial legislatures to administrative tribunals of large legislative and judicial powers raises many problems for those concerned with the wholesome development of Canadian law. We may grant the need for such tribunals under modern conditions and the desirability of their creation, if the functions are limited to administration. What we must deplore and oppose, so far as we may, is the delegation to such tribunals of the power to make and to amend substantive law, their power when made up of government officials to determine matters in which the government is interested, their power to decide matters without disclosing their reasons and to determine matters of law without supervision by the courts. These defects must be attacked and eliminated or they will grow and gradually undermine our whole system of justice. Only lawyers, and particularly lawyers in legislative bodies, can effect this most necessary reform.

Canadian Lawyers Should Remove Two Defects

Are there any defects in the administration of justice in Canada which we lawyers are under a corporate responsibility to remove? In my opinion there are two. As yet we have made no whole-hearted and determined effort to grapple with the problem of providing legal aid and advice for the less well-endowed members of the community. That problem the lawyers of the United States under the auspices of the American Bar Association are attacking most vigorously, and in Great Britain members of the profession, recognizing its imperative urgency, have devised and are operating a plan of legal aid which has received legislative sanction and support from public funds. In Canada the problem is essentially one for the lawyers in each province. We must recognize the need for us to keep pace with the enlightened opinion of our brother lawyers in the United States and Great Britain. No better opportunity awaits us for winning public regard and contributing to social tranquillity. So far the efforts we have made

in Canada to provide legal aid have been half-hearted and sporadic, and unworthy of the profession in which we justly take such pride.

And although Canadian lawyers through their provincial law societies have large disciplinary powers and do not hesitate to exercise them against erring members, only in four of the ten provinces have they recognized their corporate responsibility for the defaults of their fellow practitioners. For several years in Alberta and in Manitoba, and now in British Columbia and Saskatchewan, members of the Bar, with legislative sanction, have followed the example of lawyers in Great Britain and New Zealand and have established funds by annual contributions from all members of the profession to make good such defaults. One cannot but be impressed by the enthusiastic commendation such funds have won wherever they have been established. Not the least cordial supporters have been the members of the Bar themselves. They dismiss as farfetched and unrealistic the suggestion that the creation of such funds admits the frailty of lawyers, and is a slur on their honesty. It is my fervent hope that in the near future reimbursement funds will be established by members of the Bar in each Canadian province. By such action Canadian lawyers will recognize in the most telling way their corporate responsibility for the integrity of their fellows and win a high measure of public approval.

Considerations Involved in Granting Extensions for Applying for *Certiorari*

▪ Title 28, United States Code, Section 2101 (c), delimits the time within which an application for writ of *certiorari* to the Supreme Court, in a vast majority of cases, may be made. It also provides for an extension of that time by the Court or a Justice thereof when a request based upon substantial grounds is submitted prior to the expiration of the basic time limit fixed by the statute.

Practically all applications for extension of time to file petitions for *certiorari* are dealt with by individual Justices, granting or denying the applications by orders entered in chambers. Consequently, as neither the motions nor the orders upon them are reported in the books, counsel are not afforded the benefit of their publication for guidance.

Neither the statute nor the Court Rules require notice to opposing counsel of an extension of time obtained. The Clerk's Office uniformly furnishes the moving counsel with a copy of the order and indicates that notice should be given, but it cannot enforce that request when the order does not make notice a condition of the extension, which frequently is the case.

A recent order entered by a Justice of the Supreme Court is expository of considerations counsel should keep in mind in applying for extension of time under the statute. Charles Elmore Cropley, the Clerk of the Court, has sent a copy of this order to the JOURNAL, and it is published here with the thought that it will serve both the Court and the Bar through the distribution of information respecting the practice which is not to be found in the reports of Supreme Court proceedings.

PATRICK J. MCHUGH, *et al.*, Petitioners,

vs.

COMMONWEALTH OF MASSACHUSETTS.

WHEREAS the most effective petitions for certiorari are those which state with brief clarity the federal questions that were duly raised in a decision sought to be reviewed so as to make apparent the substantiality of such federal questions; and

WHEREAS the ninety days within which such a petition must be filed is of a length which takes into account other professional engagements of counsel; and

WHEREAS it is to the public interest that litigation be disposed of as expeditiously as possible; and

WHEREAS the issues in this case, as set forth in this application, claimed to be such as to warrant the granting of a petition for a writ of certiorari, do not need much elaboration of what is set forth in the application for an extension of time,

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 1950, provided that notice of this extension is given to opposing counsel forthwith.

FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States

Dated this 30th
day of September, 1950.

Improving the Administration of Justice:

"The Strongest Pillar of Good Government"

by **Harold J. Gallagher** • of the New York Bar (New York City)

■ "The most sacred and valued rights of man depend upon the judge for their protection and enforcement", Mr. Gallagher declares. In this article, taken from an address delivered before the dinner of the Section of Judicial Administration at Washington on September 19, during the Annual Meeting, Mr. Gallagher called for a nonpartisan judiciary to safeguard public confidence in the integrity and impartiality of the courts.

■ The words, "The True Administration of Justice Is the Strongest Pillar of Good Government", are carved large in stone on the façade of the New York County Supreme Court building in the City of New York. No one doubts their truth. Man has sought for justice since the beginning of time. Webster has said that justice is the greatest interest of man on earth. Too frequently in history and over long periods it has been denied by tyrannical rulers. In a totalitarian state it is unknown. In a free government it is a basic freedom.

We recognize that only Divine Justice can be administered with perfection; but representatives of a democratic government, judges and lawyers alike, must always earnestly strive to show forth perfection as far as it is humanly possible in the administration of justice by mortal man.

Such an administration of justice in human affairs cannot be fairly administered without honest, impartial and competent judges. That is the first and foremost requisite in the true administration of justice. A just judge is a good judge. He need not be the most brilliant, learned or profound student of the law, if he is reasonably intelligent and possessed of good common sense, if he is patient, industrious and imbued with a passion for administering justice to rich or poor alike, according to law, if he is not improperly influenced in his judicial action by popular clamor or by any biased personal, political, social or economic views of his own, he is worthy of his high office.

Man's Most Sacred Rights Depend upon Judge

There can be reposed in any man no greater measure of honor and trust than the duty and power to pass judgment upon his fellow men and to determine their rights and obligations. The most sacred and valued rights of man depend upon the judge for their protection and enforcement. Man's rights to life, liberty, property and pursuit of happiness, as guaranteed by the Constitution, have no reality other than that which is accorded them by the judges who give actual expression to those rights.

This great power for good or for evil in the daily lives of every human being in the land, which rests in the judges of our courts, imposes a solemn obligation on the appointing powers or the electorate, as the case may be, to see to it that the men who are most worthy are selected. This obligation is axiomatic, at least among lawyers, and need only be stated to insure the lawyers' acceptance of it. If all people really understood how important a good and just judge might sometimes happen to be in their own lives, and that all men are not equally competent and worthy to be good judges, they would, I am sure, demand that only the most able and worthy men be chosen for the Bench.

It is necessary for the preservation of our liberties that public confidence in the judiciary and in the judicial process shall never be impaired. No system of free government can long endure without public confidence. The esteem of the public can be retained only so long as the judges meet the rigorous requirements of their sacred trust, and thereby earn and retain the respect and the faith that go with a proper discharge of their judicial function.

In view of the great importance of right standards in the selection of judges, the lawyers and the various bar associations, including the American Bar Association, have a duty to promote and, as far as pos-

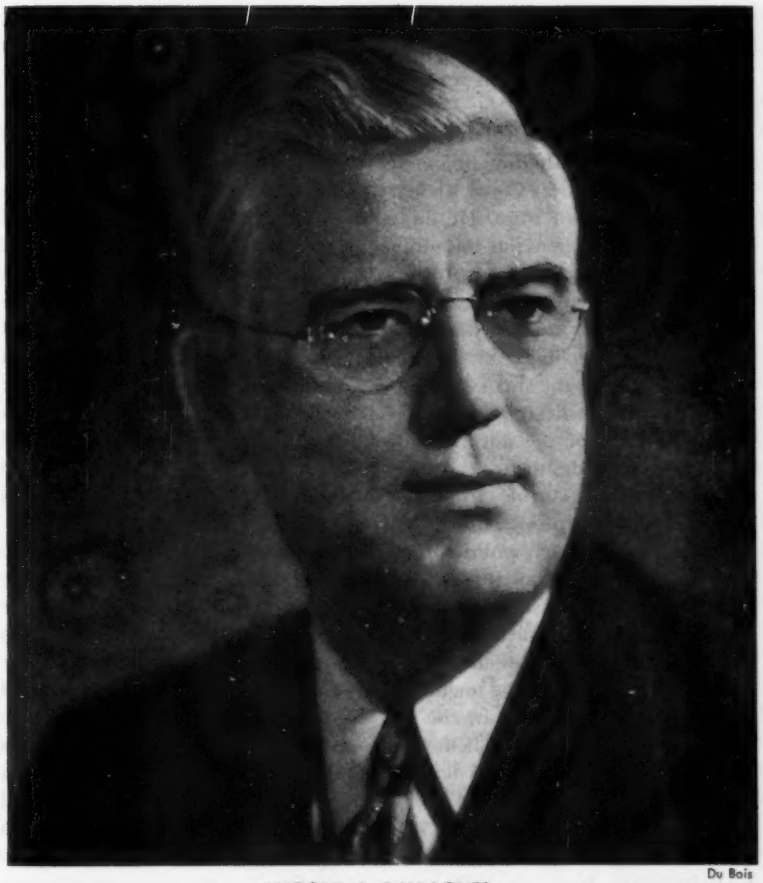
sible, insure such a selection of judges that the interests of the people will be safeguarded. Because of this responsibility, I speak on this subject this evening in behalf of the organized Bar.

The American Bar Association last met in Washington in 1932. During the intervening seventeen years approximately 75 per cent of all of the judges now sitting in the federal courts have been appointed. They have been appointed under the administration of two Presidents and a single political party, and all but comparatively few, eight out of nearly two hundred, I believe, have been appointed from a single party.

Political Leaders Should Not Select Judges

During the last seventeen years, there have been too many occasions when judges have been selected because infinitely more weight was attached to the political desirability of appointing them than to anything else. It is wrong to appoint men to the Bench purely because they have rendered political service to the party in power. If such men are entitled to some reward, let them be rewarded in some other way. Political leaders should not be consulted or have anything to do with the selection of judges. When I speak of political leaders, of course I do not mean the members of the Senate who have a solemn obligation in the matter imposed on them by the Constitution.

No one party, Republican or Democratic, should predominate so overwhelmingly in the federal courts of the land as is the case at the present time. We need at all times a nonpartisan or a bipartisan judiciary. Judges are members of a separate, equal and coördinate branch of the Government. They must never be looked upon as subordinate either to the executive or the legislative departments. There was a long period in our history when the Supreme Court of the United States was almost in political balance and it was a period of its greatest prestige. It may well be, and I do not doubt, that judges appointed from a single party can rise entirely above party affiliations in their judgment on the issues of a particular case. But a high predominance of members of a single party as judges of our courts unmistakably lessens public confidence in the nonpartisan character of the judiciary and is, I believe, detrimental to the best interests of the courts and of the country.



Du Bois

HAROLD J. GALLAGHER
President of the American Bar Association, 1949-50

The policy of restricting federal appointments to the membership of the party in power is contrary to our best precedents and marks a reversion to a spoils system policy from which lawyers have sought escape through the course of many years. The Bar acclaimed the wisdom of President Taft, when as a matter of uniform practice he made appointments to the Federal Bench without regard for party affiliations. Where the complexion of the membership of the judiciary is so predominantly of one party, a very large segment of the population is apt to ascribe political motives to decisions. And even though there is no basis to justify such a conclusion, it is a natural enough layman's conclusion which is detrimental to the maintenance of public confidence in the courts.

Judges Should Be Chosen on Nonpartisan Basis

In the handling of international affairs it has been decided that politics must stop at the nation's boundary, and that a nonpartisan or bipartisan foreign policy is necessary to the country's welfare. That the judges of all courts should be chosen on a nonpartisan basis and solely on merit is equally essential to the

country's welfare. No finer statement of the fundamentals involved in this issue can be given than that recently made in the Senate of the United States by Senator Gillette of Iowa in opposing the nomination of a man to the Federal District Court for the Southern District of Iowa. He said: "Mr. President, when the founding fathers wrote into the Constitution of the United States their concepts of a government composed of coördinating and coöperating powers they had in mind the surpassing importance of the judiciary, and of the judicial branch of the government, and it was their desire to keep it as far removed as possible from the vicissitudes, contentions, hostilities, and prejudices of party politics. The language of the Constitution, as every Senator knows, is that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint the members of the Federal Judiciary. In the instant case, Mr. President, believing as I do that this was a wise provision, and that so far as they could do it, the framers of the Constitution had tried to isolate members of the Federal Judiciary from the influences that might be brought to bear on their decisions of the utmost moment to the lives, the welfare, and the destinies of the people, I for one have been insistent, so far as in my poor power lay, to see that members of the judiciary were of the highest caliber that it was possible to secure, to see that partisan consideration should be eliminated, so far as could be done; to eliminate to the n'th degree manipulation, partisan horse trading, and factors of that type that might jeopardize the high quality and standard and dignity of the judiciary."

This power to confirm appointments places a heavy responsibility upon the Senate of the United States. It is to be hoped that in the public interest, both the President of the United States when he makes appointments and the Senate when it gives its advice and consent, will cooperate to correct the exceedingly high political unbalance that presently exists, and that due weight will be given to the fine standards stated by Senator Gillette.

The criticism is not alone however that the vast majority of our federal judges are members of the party in power. An additional criticism, that can properly be leveled at certain of the appointments that have been made, is that the best available person has not been selected. It is true that many excellent appointments have been made. But my thesis is that they should all be excellent. There isn't a circuit in this country that does not abound with men of both parties whom the Bar would instantly recognize as outstanding material for the Bench.

To appoint a truly good man to the Bench is a noble act, and so we say give us distinguished men for judges. Let them be men of high character and of devotion to their country. Let them be men learned in the law. Let them be men who have had experience in courtrooms and above all, let them have that fine sense of integrity, honor and courtesy that makes a courtroom a temple of dignity as well as a temple of justice. Let the recommendations made by the Bar of men worthy to fill these most distinguished positions be given the respect and weight they deserve. No one can better appraise the qualifications of a candidate for judicial office than his brother lawyers. The Bar, in turn, pledges itself to submit for approval only men of the highest caliber, competence and character.

The American Bar Association has long advocated a Plan for the Selection and Tenure of Judges for states having elective judiciaries. As stated by its special committee of that name in its report for the current year, the plan proposes, as a substitute for direct election of judges, (1) that judicial vacancies be filled by appointment by the executive from a list named by a nonpolitical nominating committee; (2) that at the expiration of the judicial term of office, the electorate vote, with no opposing candidate, as to whether the appointee shall be retained in office; and (3) that if the appointee be rejected by the electorate, the vacancy be filled by appointment in the same manner as the original appointment. Advocacy of this plan grows among the lawyers and laymen as they learn more of its advantages. The special committee urges that each state bar association appoint a committee to consider and report on the applicability to that state of this plan, or possible variations thereof. Influential laymen should be called in to aid in creating a favorable public opinion for the adoption of the plan in those states where the state bar association thinks it is applicable. This work is educational in character and favorable results are necessarily slow in coming. But much progress is nevertheless being made—and the good work that is being done should be encouraged and assisted in every practicable way.

Judges Should Receive Adequate Compensation

Judges of both federal and state courts are entitled to receive adequate compensation. Due to inflation, the compensation paid to judges in most places is far from sufficient to permit persons with large family obligations to accept judicial office. The judges of the federal courts fortunately have a satisfactory retirement pension system; but much remains to be done in many of the states to provide proper and adequate retirement allowances for judges either on reaching 70 years of age or earlier if disabled after a specified period on the Bench. For both federal judges and state court judges, provision should be made for appropriate allowances to the widows of deceased judges, along the lines of H. R. 7593, which was endorsed and approved by the House of Delegates of the American Bar Association last February.

Another requisite for the true administration of justice is the prompt and expeditious dispatch of the business of the courts. Justice delayed is often justice denied. The

importance to the individual litigant of a prompt decision is well illustrated by a story of an experience of a one-time Prime Minister of Algeria whose name was Khereddine. He was passing on horseback through the City of Tunis when an Arab rushed to him, stopped the horse and clamored for justice. Amused, the Minister listened and said, "Thy case is a well known one, I have studied it thoroughly and since thou wantest it to be decided at once, I decide as in duty bound, against thee." Kneeling, the man kissed the hand of Khereddine. "Thou hast misunderstood me," said the Minister, "I have pronounced against thee." "I have understood thee very well," said the man, "but I am full of gratitude; now it is finished."

We hear constantly of the dissatisfaction of business men with the slow, expensive and cumbersome procedures in our courts. So common has been this attitude among laymen that many prefer to sacrifice their rights rather than to enter into litigation; and many prefer to settle their disputes by reference to boards of arbitration, not always made up of lawyers.

That these conditions do prevail is evident to anyone who will face the facts. No one recognizes better than the members of this Section that something must be done to improve the administration of justice.

The Section of Judicial Administration has long recognized what needs to be done and has valiantly striven for many years to do something about it. Progress is being made but far too slowly, in effecting improvements through acceptance in the various states of minimum standards of judicial administration. These standards were adopted by this Association in 1938 upon the recommendation of distinguished committees under the chairmanship of Chief Judge John J. Parker. Your own Section, in recently publishing a handbook on judicial administration to assist in this work, has made a very valuable contribution, and you are to be complimented on its very able presentation of the problems. Chief Justice Vanderbilt of New Jersey, a former President of this Association, has recently edited a notable book entitled *Minimum Standards of Judicial Administration* which should have a profound influence in bringing about these essential reforms.

Law's Function Is To Resolve Conflicts

The law continues to be one of the great professions. Its primary function is in the orderly resolving of conflicts. Social order is impossible without the intelligent and honorable discharge of that function. This function expresses itself in leadership. If need be, we must lead unpopular causes which are not subscribed to by many of our fellowmen. We dare not hesitate to fight ill-founded or unreasonable demands, and we cannot stand back when the call comes to serve human needs. Without the work of judges and their advisers, the lawyers, the American concepts of liberty would not be what they are today, and for the future above the whir and din of our engrossing life, we may be depended upon to hold fast to the highest aspirations of our calling.

One of the major efforts of this Section of Judicial Administration has been to drive home to the members of the judiciary the fact that their responsibility for the administration of justice is not confined to the courtroom itself.

In our present crisis, the greatest contribution that members of the judiciary can make to the preservation of human freedom under law and to assure the perpetuation of the American system of justice is to simplify and to modernize and to render effective the judicial process from the highest court in each jurisdiction down to the local police courts. No one can perform this urgent task as well as the judiciary. It must be undertaken by the judiciary in each state where needed without delay, with a seriousness of purpose, a vital consciousness of the objective sought to be achieved, and a fixed determination to allow nothing to interfere with the prompt accomplishment of this work. It is hoped that inertia and indifference will not be permitted. This is something the members of the judiciary owe to the country, to themselves as judges and to the profession. If in any state the judiciary cannot unaided do the job, they owe a duty to their country, to themselves and to their profession to call in the aid of lawyers and of competent laymen who will be glad to help if they will but give them directions. The history of judicial reform in England and in the United States affords many examples of what laymen can do if given competent professional leadership in reforming, modernizing and simplifying an antiquated court system.

There is no time to lose—our institutions are under attack. Let us then, judges and lawyers alike, respond to this call of duty, that justice and freedom under law shall be preserved undiminished for ourselves and our posterity.

Canada and America:

The Heirs of Liberty

by **Leonard W. Brockington, C.M.G., K.C.** • of the Canadian Bar (Ottawa)

■ When Winston Churchill visited the United States in the weeks following the Pearl Harbor attack, he asked a rhetorical question in a speech before Congress: "What sort of people do they think we are?" Mr. Brockington offered an answer to that question in the address he delivered Monday evening, September 18, before a joint meeting of the Canadian and American Bar Associations.

■ We in Canada are proud to number amongst the old and faithful servants of the Canadian Bar Association a famous man who has been a member for very many years. His own merit and our recognition of it have urged his footsteps to most of the honors and duties in our gift. In his character and the qualities of his heart and mind he combines all that is best in the Latin and Celtic heritages which have so notably strengthened, colored and enriched the fabric of our country. He is, however, as Canadian as a pine tree rooted in a cleft in the granite. The brotherhood of our profession has been ennobled by his attainments and his example. Once our President, and now our honorary life President, he is also the first citizen of his native land—the Prime Minister of Canada.

Mr. St. Laurent has asked me to tell you that until a few days ago he had hoped and expected to speak at this meeting. He wishes me to express his profound regret that public duties prevent his presence. He asked me to bring to you the fraternal greetings of the members of our profession in Canada, and to voice the hope that our joint deliberations will be of lasting benefit not only to ourselves but to the North American communities which we serve. If you share his regret, as I know you do, you can well imagine mine. For here I am, a taut and trembling understudy to a great lawyer in high authority. Mr. Bernard Shaw who, you will remember, is a vegetarian, once said that he hoped his funeral procession would be followed by all the animals which he had not eaten. On hearing this, the mountainous G. K. Chesterton remarked that he would be happy to understudy one of the elephants. Alas, although no less ungainly, I am much lower down in the precedence of the animal creation. Please pity me therefore pinch-hitting for a Prime Minister. I am afraid that many of you here present have watched me on other occasions mixing up the mud in that muskeg of mediocrity which I am pleased to call my mind, or scraping out variations on an old theme with a yelping fiddle. Here tonight I shall be trying to peddle my threadbare rags of tattered scholarship in this house of the long rich robes of learning. No Fuller-Brush man ever deserved a chillier rebuff. I shall forgive you, therefore, if you discover before long that I am one of the large class of professors, preachers and politicians who are alleged to talk in someone else's sleep.

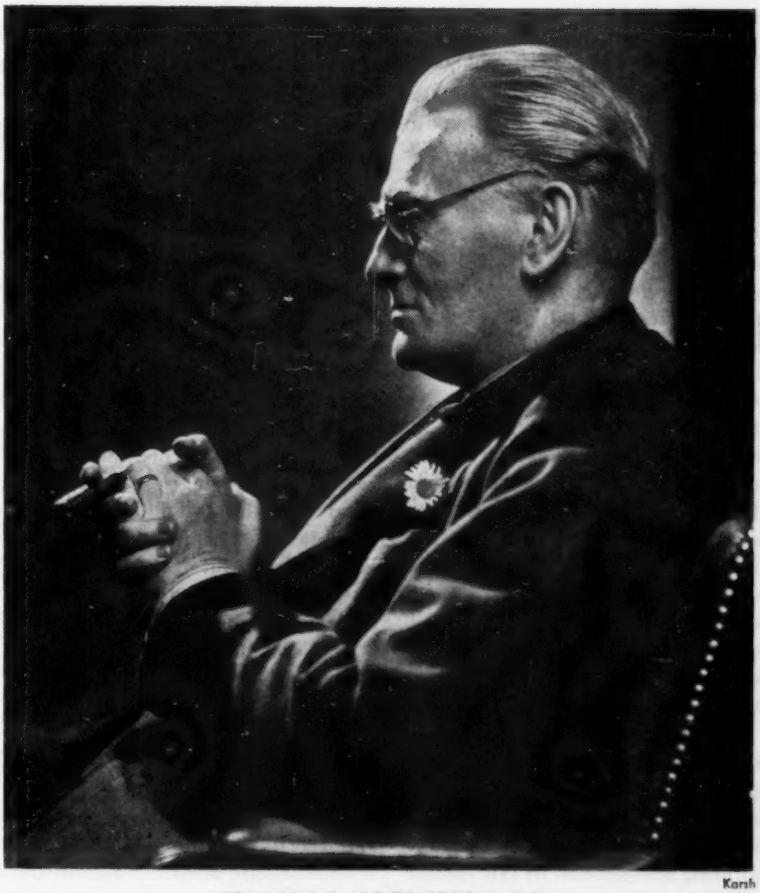
I suspect that this bipartisan policy of which we hear has gone further than we thought. I have read, as you have, of the two popes, one at Avignon and one at Rome, of the two kings of Brentford and of Gilbert and Sullivan's two gondoliers who jointly ruled the topsy-turvy island of Barataria. But I never dreamed that I would be talking in Constitution Hall in Washington in the presence of two presidents. I don't know whether to call them a duality or a duplicity. It is surely not unusual for a gentleman with the genial name of Gallagher to find his name coupled with that of someone else, but as far as I know, the Carters have always walked in splendid isolation. I hope that their present union is as welcome to them as it is to us. As for me, I thank Mr. Gallagher-and-Mr. Carter for their kind invitation to be present in this hall.

A little while ago our favorite Englishman, Sir Norman Birkett, whose coming is always a joy to us all, whose going is a sorrow, asked me whether I could distinguish Canadians from Americans in this great audience. I told him that the only difference that I had noticed

was that Canadians looked and sounded slightly more North American. Perhaps also you can tell the Canadians by the snow on their heads. If they can be identified for that reason, I humbly suggest to you that many of them have grown gray waiting for American approval of the St. Lawrence seaway.

It is always a pleasure for any Canadian to be in this lovely city, whether it be at the time of the snowdrift of the cherry blossoms, or the galaxy of the dogwood, or in the bright pageantry of the autumn leaves, when the red flag flies only where it ought to fly in America—from the top of a maple tree. I suppose, however, that no man of my birth and kindred ever walks into this capital without the haunting fear that he is liable to be arrested for ancestral arson. I expect you all know the story of the American who said to an English visitor: "We will never forgive you Britishers for burning Washington." "Burning Washington?" said the visitor; "I knew that we burned Joan of Arc but I always understood that Mr. Washington died in his bed."

You will all recall that in 1814 the wicked British burned Washington when nobody was at home. You sometimes forget that this shameful conduct was in foolish revenge for a similar operation by American troops in what is now the sacred city of Toronto. I have no desire to wash Canadian linen in the unsullied waters of the Potomac. But I have heard that from time to time secret societies have sprung up in various parts of Canada with the avowed object of inviting your incendiary troops back to Toronto. But all that belongs to the mists of antiquity and iniquity.



Karsh

LEONARD W. BROCKINGTON, K.C.

A Physical Communion with the Greatness of the Past

Today it is an inspiration to visit this great city in which the hope of the humble finds its temple and its stronghold. Standing in this hall, bright with the buff and blue of George Washington, I can say that we are all overwhelmed by the sanctity of the place where great men have done great things. As the historian says, time does not remain but space does. Though we cannot seize the past physically, we can stand physically upon the site and hearing the echoing of great voices and the tread of ghostly footsteps, we can have in a very real sense a physical communion with the past by standing on that very spot which the past greatness of men and events has occupied. Here around us we see a city which has grown great out of the heart of America. We your neighbors in your midst in this city of memorials and triumphs share not only the poignancy of a nation's sorrow and the thanksgiving of a nation's pride but are exalted by the hope of so much that is sacred to mankind enshrined in this place.

I have carried with me for many years a memory which perhaps I have shared with some of you before. It was once my honor to speak to this country on the Fourth of July. I received a letter from a man in San Francisco which recorded these words:

"In the geography of the map it is a long way from Ottawa to San Francisco, but in the geography of the human heart the distance is so small that it cannot be measured." And I think that I speak for all my Canadian brothers and sisters when I tell you that that is just how we feel on our visit to Washington where once again we find at your table, in friendship, in understanding and in hospitality, what my Southern friends so beautifully call "a gracious plenty".

Canadians and Americans— Friends in Peace, Allies in War

We meet here tonight as neighbors and brothers. There are no two such

national neighborhoods and brotherhoods in the whole world. Never I think in our history until tonight have so many Canadians and so many Americans met together in such close and friendly proximity, except as allies on the field of battle fighting together in one great cause. We have come here first because you asked us so graciously and so generously. We have come because we heard the resonant call of professional brotherhood. But there are far deeper reasons for your cordial asking and our enthusiastic coming. Although "Heaven has shown us different fires and our dooms have dealt us differing years" we both know that for each of us the lantern is always lit in the window and the latchstring loose on the door, that we need no passports to each others' hearts and that there can be no fortifications on the frontiers of the human spirit where men pass in equality and freedom.

Perhaps all men in brotherly and professional convention tend to exaggerate the importance of their affairs and the results of their deliberations. But I can think of no more inspiring communion in this shattering crisis of the world than a meeting of the hearts and minds of men who as neighboring citizens love the same things and hate the same things and as workers are dedicated to the principles and practice of that law without which liberty has no beginning, no meaning and no life. Our associations have an honorable record. For we have worked steadfastly in encouragement of the rule of law, not only in our own nations but throughout the world. We have labored in furtherance of that understanding amongst peoples who believe that the basis of good government is the enforcement of the will of the majority by the instruments of peace, with the due preservation of the rights of the minority to speak their minds without fear.

Our Responsibility Is to the Future

Today our responsibility is to the future and not to the past. Before this meeting ends there will, I know, be many memorable definitions of the majesty of the law, many discerning analyses of the state of the world, many heartening calls to thought and action. Nothing that I can say can add to the sombreness of the world scene, the solemnity of the occasion or the paramount need for hard doing and clear thinking.

Once again we see "war's planned approach and cruelty's careful reign", and children in classrooms chanting savage lies. There is a shaking of the foundations of civilization, a rumbling of the whole earth and the threat of blood-drenched chaos. Once again there are angry seas and skies vivid with the honor of our youth and brave men facing and conquering hopeless hills. New voices of liberty have been raised from the midst of millions who for long ages have been silent and sullen. The new liberty is still menaced by the old tyranny.

We have found no comfort in victory. Eyes have been darkened and hearts hardened. We are confronted with a unity of the utmost savagery and ferocity of design in a conspiracy to exterminate from the face of the earth honor, humanity, justice and religion. In words once spoken 170 years ago by the greatest orator who ever used our English tongue for the indictment of evil, Edmund Burke:

> We are in a war of a peculiar nature. It is not with an ordinary community, which is hostile or friendly as passion or as interest may veer about —not with a state which makes war through wantonness, and abandons it through lassitude. We are at war with a *system* which by its essence is inimical to all other governments; and which makes peace or war as peace and war may best contribute to their subversion. It is with an armed doctrine that we are at war.

We Need a Recovery in the Conscience of Mankind

If there are warmongers who plan our destruction, there are also peacemongers who weaken our fabric. It is the hammer that breaks the peace. Let us see to it that it is the sickle which will reap the whirlwind. What we need, each one of us above all else, in the words of an eloquent American, is "recovery from depression in the conscience of mankind". It is for you and me and each one of us to determine whether our children will see not the ruins of an old world but a new world built bright in dark air; whether the theme songs of the future will be songs of joy and of merriment and peace, or the saddest sounds that ever break the silence— the tramp of marching men and the cry of children.

It is not for me to adorn arguments or to preach sermons to you or to any men. But I would like to call up two precedents for your inspiration. They haunt me in these turmoiled and troubled days. They are both spoken by living Englishmen. The first is by the most liberal of living scholars who was nourished with the draughts of liberty from Grecian fountains:

> The power of death is again abroad over the world. It has taken lives innumerable and better lives than ours. Let those of us whose bodily life is still spared make sure that the souls within us shall not die.

And the second are words written by the Poet Laureate of England, who as a young man sailed before the mast around the seven seas, and learned the dignity of labor and the majesty of man's ordinariness in these United States. They enshrine a truth garnered from the triumphs and sorrows of the ages:

> True patriotism is not a song in the street and a wreath on a column and a flag flying from the window. It is a thing very solemn and very terrible like life itself. It is a burden to be borne, a thing to labor for and to suffer for and to die for—a thing which gives no happiness and no pleasantness, but a hard life, an unknown grave and the respect and bowed heads of those who follow.

An Answer to Churchill's Question

Early in the year 1942, when the dark clouds that overhung the earth were pierced by the new light of your great decision, when you had ordered your anger for the good of all the earth, there came to Washington a famous man, whose name will live as long as noble words uplift

the human heart, as long as courage is acclaimed as the greatest virtue, as long as the free spirit of man defies the thunder. He addressed a meeting of the American Senate and the House of Representatives. He asked a rhetorical question: "What sort of people do they think we are?" The "they" have changed from the Germans and Japanese to the Russians. The "people we are", I hope, remain the same. As in this gathering there are Americans and Canadians, Englishmen, and an honored guest from Joan of Arc's sweet land of France, I am going to try, as one of these people, to answer Mr. Churchill's question. I can only regret that the answerer is so unworthy of the questioner. And if my answer has a North American accent and emphasizes North American ideals and things, I do not forget what we in this continent owe to steadfast Britain and chivalrous France. In this hall while we meet as lawyers we meet no less as North Americans. Between the American and the Canadian peoples there are no doubt differences in character, in outlook, in historical perspective. Some of the differences are superficial, some go deep. But I think we can agree that no two peoples in the world are more alike. We have both found unity in diversity. We are both children of the frontier. It is not long since the grandfathers of most of us brought the wild places of our earth in liberty and law to the service of mankind.

Hear the wind
Blow through the buffalo grass,
Blow over wild grape and briar;
This was Frontier, and this,
And this your house was Frontier.
There were footprints upon the hill,
And men lie buried under,
Tamers of earth and rivers
They died at the end of labor.
Forgotten is the name.

We have both tamed great continental spaces for our use. I venture to say that as far as Canada is concerned, never have so few people set the landmarks of law and order upon a space so vast and divided. Perhaps for both of us our destiny is changing, and certainly for you of the United States. For today your frontier is the world and it is your destiny to be the vigilantes in the wild places of the earth, as once you were on the untamed plains and shaggy wildernesses of your own land.

Our Nations Are Children of Many Races

Both our nations are the children of many nations. From our far beginnings we have welcomed to a share in our labors, our hopes and our citizenship, men and women of many races. Perhaps in these later and more dangerous days we have fallen short of the enlightened generosities of those who came before us. But the history of both our peoples is the story of the strong, the proud, the independent of the earth, whom poverty could not degrade nor hardship dispirit nor disillusion. We in Canada have long been inspired by living words once spoken by your immortal dead. In order that you may know our own traditional Canadian answer to the yearnings in the hearts of men of all races who once sought beyond the seas new horizons of hope and happiness for themselves and their children, I would like to read to you a few sentences from a speech by the most eloquent of the fathers of our own Confederation. They take their place with the words carved on your Statue of Liberty, amongst the great generosities of this continent:

> Dear, most justly dear to every land beneath the sun, are the children born in her bosom and nursed upon her breast; but when the man of another country, wherever born, speaking whatever creed, seeks out a country to serve and honor and cleave to, in weal or in woe—when he heaves up the anchor of his heart from its old moorings, and lays at the feet of the mistress of his choice, his new country, all the hopes of his ripe manhood, he establishes by such devotion a claim to consideration not second even to that of the children of the soil. He is their brother delivered by a new birth from the dark-wombed Atlantic ship that ushers him into existence in the new world; he stands by his own election among the children of the household; and narrow and unwise is that species of public spirit which, in the perverted name of patriotism, would refuse him all he asks—"a fair field and no favor."

That has been the seal of our covenant, which, in spite of occasional backslidings and petty injustices and stupid prides, we have striven to keep.

We have both most colorful, strange and romantic histories. Both of us have fulfilled the ancient prophecy—you many years ago and we in days far younger—"A little one shall become a thousand and a small one a strong nation. I, the Lord, will hasten it in his time."

Yours are the unkempt democracy, resilient strength, divine improvisation and magnificent impulses. How many unharnessed energies and imprisoned splendors and unquenched hopes have you not released for the progress of the world? To how many average men has this continent taught what Walt Whitman called "the glory of his daily walk and trade"? Your history is known to us, ours is so often unknown to you.

May I summon up and sum up for you our American friends in a few sentences the proud procession of Canada—her mariners, French and English; her first settlers in New France; her holy and humble men of heart who brought the bread of heaven and the cross of Joan of Arc; the devoted women who carried with them compassion and mercy; the busy fur trader, the Highland soldier bringing with him the wisdom of the Western seas; the Hanoverian, the Loyalist who lost an Empire and found a Commonwealth; our great-grandfathers and great-grandmothers who braved everything for our sakes; the policeman of the plains who determined that wherever the King's Writ ran it should run through paths of peace and highways of order; the cowboy, the remittance men who went home in August, 1914, and never came back because as my old friend the editor of the *Calgary Eye Opener* once wrote: "They may have been green but by God they weren't yellow"; the great army of those who tilled our soil that was often kindly, but sometimes harsh and cruel, and thousands of

men and women of every race laying their little gifts upon our country's altar; men and women with many pasts, the pasts of Europe and one future—the future of Canada; and, in war, magnificently justifying the writing of their names in our national family Bible because in many far places a sorrowing nation wrote the epitaph of their sons.

Canada and United States Are Heirs of Liberty

And so you Americans and we Canadians have received into our bosom many races. Our rhythm pulses with the labors of the frontier and the taming of the wilderness. We have found unity in diversity. We are both the heirs of liberty. Long ago you made two great resolutions—you determined never to be slaves and, what is almost better still, never to enslave another nation. The breath of freedom has always been the prevailing wind that has swept our hills and valleys. And not least because of your example when you founded the first true democracy nearly two hundred years ago, yet when wise men in Britain and in Canada so labored that the hearts and minds of Canadian men and women have been for long united under the rule of law and in freedom under the law. Canadians stand today in equality and independence in a new-found strength and in willing sacrifice side by side with the free nations of the earth. In our varying ways we have hammered out on the anvil of our freedom a pattern of democracy. Although we have been spared most of your violence and mercifully all your fratricide, we too have learned that every man deserves the opportunity to create the benefits of the community in which he lives, and that every man should share the burden of their creation and the right of their enjoyment. We have determined with you that our children shall not be shackled by the dead hand of custom. We, like you, have never deserted a friend or failed any just or generous cause clearly spoken or shrunk from any truth starkly and courageously proclaimed.

And so, we children of the frontier, we lovers of freedom, we haters of tyranny, we moulders of democracy, we whose motherlands are the kindly nurses of children of all races, we who seek to exploit or enslave no man or nation, are joined together in the citizenship of North America. I will not speak to you of the majesty of the law which brings us together as lawyers, as willing workers, famous and humble, great and small. So many of you know far more than I do of the wide humanity of the law; its traditions of freedom, the need of it in the structure of human society and the enshrining within its domain of so much that is essential in the building of a free and enlightened world. As I say farewell, I recall that I first saw the Bar of America in conference assembled in Symphony Hall at Boston, a great meeting-place dedicated to that art which speaks to the hearts of men and women in the universal language of music. I find myself tonight in another spacious hall where many great musicians have struck the chords of beauty and of humanity. I am happy to think that the lawyers of our two countries are also joined together in a harmony of expression and of purpose. There is not a Canadian in this room who does not know that today the American people are as harassed and restless as at any time in their history. But, speaking, if I may, as one of your Canadian neighbors, let me say simply this—that we and all our comrades of the Commonwealth are proud that the destiny of human freedom lies in the strength of your arms, the resolution of your minds and the generosity of your hearts. It has never been in a custody so noble. I know that sometimes you despair of yourselves. No one else ever despairs of you. I read the other day a book by a great American author. He too had been through all the questionings and doubts of a great mind searching for the truth. When his thought emerged into the North American sunlight these are the words he wrote:

> I believe that we are lost here in America but I believe we shall be found . . . just as I know that America and the people in it are deathless, undiscovered, immortal and must live.
>
> I think the true discovery of America is before us. I think the true fulfillment of our spirit, of our people, of our mighty and immortal land is yet to come. I think the true discovery of our own democracy is still before us. And I think that all these things are as certain as the morning, as inevitable as noon. I think I speak for most men living when I say that our America is Here, is Now, and beckons on before, and this assurance is not only our living hope but our dream to be accomplished.

As for our land, its sons and its brothers in liberty, in all things and in all times, we shall be with you in effort and sacrifice until the end. In the bewilderment which encircles us, in the mists of uncertainty which dim our eyes, in the clamor of recriminating ideologies which deafens us, there is little which individually we can do except, like Henry V's soldiers, to stiffen the sinews and summon up the blood. There is, however, one armor which we can all put on. It is the armor of that supreme courage, the undying faith, the unshaken hope. If it is to find its real strength it must be hammered and fused in union with unbreakable resolution, inflexible determination. Who doubts that it will be? Always and everywhere, I find comfort in the mintage of an eastern poet transmuted by genius into fine English gold:

> For like a child, sent with a fluttering light
> To feel his way along the gusty night
> Man walks the world; again and yet again
> The lamp shall be by fits of passion slain.
> But shall not He who sent him from the door
> Relight the lamp once more and yet once more?

Do We Want What They Have?

A Comparison of American and Soviet Democracy

by **Robert G. Simmons** • Chief Justice of the Supreme Court of Nebraska

■ "Our difficulty in understanding what the Communist and Soviet leaders say is that they use our words with their meaning" Chief Justice Simmons declares. Asking the question, "Do we want what they have", he proceeds to an examination of what the Soviets mean when they use such words as "democracy", "free elections", "freedom of speech" and "freedom of religious worship".

■ Some months ago I sat in a public meeting in Madison Square Garden in New York. During the evening I heard the President of the United States ridiculed, the Congress damned, our courts scorned, and the Constitution of the United States condemned. I was an observer at a meeting held for the purpose of raising money to aid in the defense of Communist leaders then on trial. I witnessed multiplied hundreds stand with the raised clenched-fist salute of the Communist, while they cheered the head of the visible Communist Party in this country, approved his attacks on our system of government, and pledged in effect to continue the fight in this country until our institutions were remodeled to accord with those of the Soviets.

I asked myself then, as I ask you now, do we want what the Communist countries have?

This country has come tardily, too tardily, to a realization that we face a menace from Communism—not in Moscow, or Budapest, or Praha, but in the United States. We shall not meet this challenge successfully by merely being against Communism and damning Communists. We should examine their system of government, look at its parts, and decide whether or not we want any or all of it in America, bearing in mind that we are one of the few great peoples in the world who yet have the power to make that decision.

I propose briefly to do that with you as we think about it together.

Our difficulty in understanding what the Communist and Soviet leaders say is that they use our words with their meaning. It is the difficulty which our officials in Washington face in dealing with them. We must first translate our language into their meaning in order to reach a common understanding of their system of government, their ideologies, and even their promises.

Let me illustrate. They speak of representative government and we think of our system where, by open elections, we choose between the candidates of different parties, representing different basic views or governmental policies. We choose between men and plans. The Soviet elector has only one set of candidates and one party, and approves only that which the party submits. That is their idea of representative government.

Contrast Between American "Democracy" and Soviet "Democracy"

They speak of democracy, and we think of our own. We fail to recognize the fundamental difference. With us, democracy represents a government where the reservoir of political power rests in the 150 million folk who make up our citizenship, where we measure out, guardedly, the power that our officials are permitted to exercise, and where officials are servants, not masters. The Soviet uses our word "democracy", but as meaning a government where the reservoir of political power rests in the closely-knit 2 or 3 per cent of the people that make up the Communist Party, where the people exercise only those privileges that the Communist Party permits them to exercise from time to time, and where officials are masters, not servants.

They have courts. When they refer to them we think of our own judicial systems with all their independent powers, subject to constitutional limitations and grants of power. We do not recognize the fact that the courts of the Soviet system are but subordinate administrative agencies of the Communist Party.

The Communist speaks of the constitution of the Union of Soviet Socialist Republics and we think of our own federal and state constitutions, and somehow think that they

have what we have. Our constitutions speak the mandate of the people; theirs, the mandate of the Communist Party. Our constitutions were adopted by action of the people taken for that direct purpose. Their constitutions were promulgated by Communist Party bodies and never were submitted, and it is not intended that they ever shall be submitted, to the people of the Soviet countries for their adoption or rejection. Our constitutions cannot be changed except by action of the people taken for that purpose. The Soviet constitution can be and has been repeatedly changed by action of the creating body. Those changes have not been, and it is not intended that they shall be, submitted to the people of the communist nations for their approval or rejection. Do we want their kind of a constitution?

Soviet Constitution Contains No Protection Against Government

Our constitutions are either grants or limitations of power to officials of government. Let us make some comparisons there.

Search their constitutions. You will not find there any such provisions as are in our own providing for the writ of *habeas corpus*, the right of trial by jury, the right of appeal. Neither will you find provisions against *ex post facto* laws, bills of attainder or other similar provisions. Those guarantees and many others are in our constitutions for a reason. They are there to protect people, individual persons, from the arbitrary power of officials of government; they serve that purpose in America. The people, individually and collectively, under the Soviet system do not have such safeguards. Do we want to surrender that which we have?

During these last years we have again had cause to examine into our Bill of Rights. If you have not lately read the first ten amendments to the Federal Constitution, then I suggest that some evening soon you do so—seriously, thoughtfully. You will find no words in the Soviet constitution comparable to the first five words of the First Amendment—"Congress shall make no law". There is no such denial of power in the Soviet constitution. Do we wish to surrender that prohibition on the power of government?

The first of the ten amendments is, in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Some of us call the guarantees of our Constitution inherent rights; some call them individual rights; some call them civil rights; some call them the God-given rights of men that governments must respect and must not invade.

But the Communists tell us that they have similar rights provided for in their constitution. Their provisions are:

> *Article 124:* In order to ensure to citizens freedom of conscience, the church in the USSR is separated from the state, and the school from the church. Freedom of religious worship and freedom of antireligious propaganda is recognized for all citizens.
>
> *Article 125:* In conformity with the interests of the working people, and in order to strengthen the socialist system, the citizens of the USSR are guaranteed by law:
>
> (a) Freedom of speech;
> (b) Freedom of the press;
> (c) Freedom of assembly, including the holding of mass meetings;
> (d) Freedom of street processions and demonstrations.
>
> These civil rights are ensured by placing at the disposal of the working people and their organizations printing presses, stocks of paper, public buildings, the streets, communications facilities and other material requisites for the exercise of these rights.

I shall not here comment upon the difference in meaning of our "Congress shall make no law" and the Soviet phrase "is recognized". Neither shall I dwell upon the "by law" provisions of the Soviet constitution, save to point out that by our meaning that provision is inoperative unless affirmative legislation is enacted.

Rather, let us find out what these so-called guarantees mean in the language of the Communist.

Vishinsky Explains Soviet Theory of Rights

I refer now to *The Law of the Soviet State* by Vishinsky, presently Foreign Minister of Russia, formerly Commissar of Justice, and a recognized authority and lecturer on Soviet law. Vishinsky states that the source of civil rights in that land is in the government "rather than in any myth as to man's natural and inherent rights". (Page 563.) So we start with a basic difference in the source of civil rights. If, as they contend, that source is in their social organization, that it gives the rights, then of necessity, the same power can take them away. Do we want to accept that philosophy?

Vishinsky says that lying at the foundation of all the legislation of the Soviet state on the matter of religion is the proposition of having a "negative attitude toward religion, carrying high the banner of militant atheism"; they have "initiated from the very earliest days a planned and decisive struggle with religion"; they aspire "to liberate the conscience from religious superstition". (Page 607.) Following these aims, and apparently as an intermediate step to the ultimate accomplishment of "militant atheism" among Communist peoples, all property of churches and religious societies was confiscated and declared to be public property; the religious organizations were denied any legal status; they are permitted the use of special buildings "exclusively for religious purposes"; they are required to register with the civil authorities in a "special manner"; their right to administrative organizations is limited —"local soviets supervise the activity of religious organizations" and "Religious organizations are forbidden to create funds for mutual assistance, cooperatives, or production units, to organize other than religious assemblies, groups, excursions, libraries, reading rooms or the like—anything, that is to say, not immediately related to the basic functions of religious organizations." (Page

609.) He summarizes the result of their governmental policy to date in this language: "The struggle with religion is . . . carried on, not by administrative repressions, but by the socialist refashioning of the entire national economy which eradicates religion, by socialist reeducation of the toiling masses, by antireligious propaganda, by implanting scientific knowledge, and by expanding education. The mass exodus of USSR toilers away from religion is directly due to these measures taken in their entirety." (Page 609.)

Do We Want Militant Atheism?

Do we in America want our institutions of government to be refashioned so as to eradicate religion and so as to establish militant atheism as the basic governmental policy? I need but ask you to recall what has happened to religious organizations, priests, ministers, folk of faith in the countries behind the Iron Curtain. Do we want what they have?

We are told that Article 125 guarantees the rights there set out. What do they mean in the language of the Soviet?

Vishinsky says: "Having given the toilers freedom of speech, assemblies, street parades, press, and so on, the Soviet government explicitly excluded the nonlabor classes from enjoyment of this freedom." (Page 614.) Who are the nonlabor classes to whom this freedom is excluded?—and what a contradiction of terms. He answers: "One of the first and most important measures of the Soviet government in assuring actual freedom of the press in behalf of the toilers was the closing . . . of numerous organs of the counterrevolutionary press." (Page 615.) In short, freedom of the press is denied to those who would oppose the policies of the government.

Vishinsky refers to "our papers" and the law standing guard for the Soviet press by providing "for political-ideological control" of the press "to prohibit the issuance, publication, and circulation of productions . . . containing agitation and propaganda against Soviet authority and proletarian dictatorship". (Page 616.) To violate Soviet legislation concerning the press carries criminal penalties. Vishinsky says: "In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism. Every sort of attempt on their part to utilize to the detriment of the state . . . these freedoms granted to the toilers must be classified as a counterrevolutionary crime. . . . Freedom of speech, of the press, of assembly, of meetings, of street parades, and of demonstrations are the property of all the citizens in the USSR, fully guaranteed by the state upon the single condition that they be utilized in accord with the interests of the toilers and to the end of strengthening the socialist social order." (Page 617.) Vishinsky says: "The Soviet state . . . does not include freedom of political parties in the enumeration of these freedoms granted . . ." (Page 627), and that " . . . only one party can exist —the Communist Party. . . ." (Page 628.)

Do We Want Freedom To Support Only Party in Power?

Do we want their sort of freedom of the press, of assembly, of speech, of political parties, in our America—a freedom to be exercised only to support and not to oppose the policies of the party in power? To oppose communism by speech or by press in the Iron Curtain countries is a crime. Do we want that to be the law of the United States? Do we want what they have?

But of what avail is it to have guaranteed rights of any kind in constitutions unless there is an agency of government that has the power to make those rights effective as against the actions of the government itself? In this country the courts, state and federal, have the power to say to officials of government, "These things you undertake to do you cannot do, because the people have denied or not granted you the power that you seek to exercise." Constitutional guarantees

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are 'supreme, and effectively so, through the agencies of the courts. If any official of government undertakes to invade your rights guaranteed by the Constitution, it is not necessary that you go to your state capital and seek out some official and implore him to protect your rights; you need not go to Washington and there seek someone who will undertake to intervene for you. In America the individual has the *right*, and I emphasize "right" as against "privilege"—the individual has the right to go to the court located in his county and there challenge the power of the Government and secure a judicial determination of whether or not his rights are invaded. If it is found that constitutional *rights* are invaded, the courts have the power to stay the strong arm of the Government itself. That power of the judiciary is the peculiar genius of our institutions that makes constitutional rights effective.

But the Soviet says "We have courts", and they do—but without the all-important power of the

courts of America to enforce and make effective constitutional rights of the individual. The courts of Russia are but administrative agencies of the government, subject to administrative direction and control. Lenin is quoted as having said that the courts were organized to force discipline on the working class. The Soviet courts do not have the power to protect the individual from governmental action, but rather are used to enforce administrative governmental decisions. One of their early writers said in effect that a club is a primitive weapon, a rifle an effective one, but the most efficient method for a government to control a people is a court that officials of government control. Such constitutional rights as are recognized in those countries are effective only insofar as the Communist Party and its controlled agencies, including the courts, permit. I need do no more here than call your attention to the procedures, powers, and decisions of the so-called courts of the Communist countries which they have permitted to be told to us. Contrast their system with ours. Do we want what they have?

Time does not permit a detailed discussion. I suggest that you seriously weigh the rights that men and women in industry, in the professions, in the social agencies, in business, in any vocation, have in America. Then study and weigh comparable privileges—not rights—in the Communist countries. Finally, after you have summed up—ask yourself, do you, individually, want what they have in Russia and the Communist countries in lieu of what you now have and can achieve for yourself in America. Do you want what they have?

I can sum up the whole matter in these short sentences. Our constitutional system, our laws, our courts, are designed to protect the individual person and people as a whole from the unauthorized power of government. The Communist system is designed to protect those in control of the government from the power of the people. Therein lies the difference between liberty and the lack of it in an organized society.

May I suggest that you study our system and theirs, and that as you do so, you ask yourself these questions: Is there a difference between our system of government and that of the Communists? If so, is that difference in favor of the American system? If so, is it a difference worth preserving? And if so, are you doing all in your full power to maintain and strengthen the institutions of government that are ours?

Those questions I leave with you.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1951 Annual Meeting and ending at the adjournment of the 1954 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

An election will be held in the State of Florida to fill the vacancy in the term expiring at the adjournment of the 1953 Annual Meeting. The State Delegate elected to fill the vacancy will take office immediately upon the certification of his election.

Nominating petitions for all State Delegates to be elected in 1951 must be filed with the Board of Elections not later than April 19, 1951. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 5) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 27, 1951.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 19, 1951.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> **Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.**

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Harold L. Reeve

Conflict of Laws:

Trustor's Right to Designate Controlling Law

by **Delger Trowbridge** • of the California Bar (San Francisco)

■ Will the courts of one state respect the wishes of the settlor domiciled in another state creating an *inter vivos* trust declaring which state law shall govern the construction and interpretation of the trust? Mr. Trowbridge examines the modern law on this subject below.

■ The New York Court of Appeals some years ago obeyed the following instructions of the trustor of a living trust:

> The laws of the State of New Jersey shall govern this trust indenture and any construction to be placed thereupon or interpretation thereof. [See *Shannon* v. *Irving Trust Co.* quoted below.]

This article will discuss how far in the United States similar instructions given by trustors of living trusts are followed, and with what qualifications.

To narrow the question, we are not going to discuss trusts of land or testamentary trusts. The latter present few problems in conflict of laws because the law of the testator's domicile usually applies, as is stated in the *Restatement of Law of the Conflict of Laws*, Sections 295 and 296, "unless the will shows an intention that the trust should be administered in another state". Section 298. We shall usually limit the discussion to cases where the trustor clearly indicated his intention that the law of a particular jurisdiction, in fact different from the law of the forum, should be applied to his trust instrument.

Fortunately the law is much more settled now than it was when Professor David F. Cavers wrote his excellent article "Trust Inter Vivos and The Conflict of Laws".[1]

Until recently the general rule has been that the law of the domicile of the trustor should be applied in testing the validity of *inter vivos* trusts.[2]

Modern Rule Allows Trustor To Choose Applicable Law

However, the modern rule seems to be, with certain qualifications, that the trustor should be allowed to select the law that is to be applied to the construction and questions of validity of his trust declaration.[3]

The reasoning of the New York Court of Appeals on this question in the leading case of *Shannon* v. *Irving Trust Company*, 275 N. Y. 95, 9 N. E. (2d) 792, 793-794, is as follows:

> Much confusion has existed concerning the law that controls the validity and administration of inter vivos trusts of intangible personal property where the domicile of the settlor is in one state and the situs and place of administration is in another. No invariable rule can be formulated for all cases involving varying facts. The domicile of the settlor is no longer the absolute and controlling consideration. Hutchison v. Ross, 262 N. Y. 381, 187 N.E. 65; Matter of Brown's Estate, 274 N.Y. 10, 8 N.E. (2d) 42. Where the domicile of the owner of the res and the actual and business situs of the trust do not coincide, the law applicable to the interpretation, construction, and validity of the trust and the legal obligations arising out of it and to taxation depend upon facts involved in and circumstances surrounding the particular case. In such a situation, the express or clearly implied intent of the settlor may control. . . .
>
> In the case at bar the execution of the trust instrument, the location of the res, the domicile of the trustee, and the place of administration of the trust are in the city of New York. The intent of the settlor that in all matters affecting the trust except remuneration of the trustee his domiciliary law shall govern is expressly stated in the body of the trust instrument. The intent is manifest; no uncertainty exists. The instrument should be construed and a determination of its validity made according to the law chosen by the settlor unless so to do is contrary to the public policy of this state.

This rule is subject possibly to two qualifications; first, that where the state law selected by the trustor is different from the law of the forum, the former must not run coun-

1. 44 Harv. L. Rev. 161 (1930).
2. 139 A.L.R. 1132; Bogert, *Trusts and Trustees*, § 211; *Hutchison* v. *Ross*, 262 N. Y. 381 (1933).
3. *Shannon* v. *Irving Trust Co.*, 275 N. Y. 95, 9 N.E. (2d) 792, 793, 794 (N.Y. 1937); *Irving Trust Co.* v. *Natica*, 284 N.Y.S. 343; *Kitchen* v. *New York Trust Co.*, 168 S.W. (2d) 5, 7 (Ky. 1943); *Liberty Bank* v. *New England Investors*, 25 F. (2d) 493, 495 (D.C. Mass. 1928).

ter to the public policy of the latter.[4] The usual questions involve either the Rule against Perpetuities, the rule relating to the suspension of the power of alienation, or the rules relating to the period during which income can be accumulated, all differing more or less from the common law rules. In none of these cases has the court of the forum been offended by the differing rules of the jurisdiction designated by the trustor.[5]

The second qualification is the one stated by the Supreme Court of Delaware, which has had unusual experience with trust agreements, in the following words: "The donor's intention shall prevail if there is a real connection between the selected jurisdiction and the transaction."[6]

Such connections have been found sufficient where the law selected by the trustor is either that of (1) his domicile, (2) the domicile of the trustee, (3) the situs of the trust res, (4) the place of administration of the trust, or (5) the place of execution of the trust instrument.[7] The domicile of the beneficiaries heretofore suggested has not been accepted by the courts.[8]

So far this discussion has only touched questions of substantive rights under living trusts and not questions relating to their administration.

Restatement Gives Rule for Administration of Trust

The rule on the subject of administration has been stated in the *Restatement of Conflict of Laws*, Section 297, as follows:

> A trust of moveables created by an instrument inter vivos is administered by the trustee according to the law of the state where the instrument creating the trust locates the administration of the trust.

Comment "d" to this section says:

> In order to determine where the administration of the trust is located, consideration is given to the provisions of the instrument, the residence of the trustees, the residence of the beneficiaries, the location of the property, the place where the business of the trust is to be carried on.

These rules, in the absence of any intent expressed by the settlor, have been generally followed by the courts.[9]

There is a division of opinion as to whether the courts should follow the express intent of the trustor on this subject.

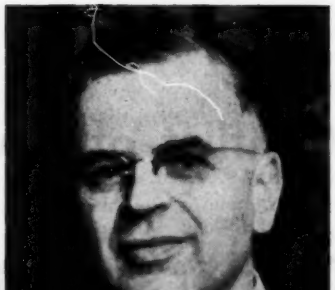
It has been said by one authority that "if an express intent has been found contrary to a preponderance of the relatively more important factors found within a single state, it would seem that the express intent should not govern",[9] citing one case.[10] This case is, strictly speaking, not in point. The trustor, domiciled in California, provided that the Massachusetts law should be applied to his trust and named a Massachusetts trustee to manage the property which was located in Massachusetts. The trust instrument also provided that payments of income and principal should be made to the beneficiaries as ordered by a certain probate court in Ohio. The Massachusetts court refused to follow the orders of the Ohio Probate Court on the fundamental ground that the latter had no jurisdiction in the matter. Since neither the trustee nor the trust property were located in Ohio it is apparent that there was no way the Ohio court could get jurisdiction. In this case the Ohio court was only interposed for the determination of a question of fact and not the application of some foreign law.

On the other hand, in a case where the Delaware Chancery Court had personal jurisdiction over the trustee and the trust res consisted of stock in a Delaware corporation, the Delaware court refused to exercise jurisdiction because the trustor obviously intended that the Maryland court should exercise jurisdiction.[11]

Also the New York courts apparently applied the law of New Jersey, as directed by the trustor, on the question of the effectiveness of a revocation of a living trust which is usually considered an administrative matter.[12]

Location of Trust May Change

Furthermore it should be noted that the location of a trust after its creation may be changed from one state to another where a trustor empowers his beneficiaries to select a new trustee domiciled in a different state from that of the original trustee.[13] One court not only held that the law of the second state applied to administrative questions, such as the validity of the exercise of a power of appointment given by the original instrument, but also to questions of



Delger Trowbridge practices in San Francisco. A graduate of the University of California (Berkeley) and of Harvard Law School, he has been a member of the House of Delegates almost continuously since 1938, and has been State Delegate since 1944. He has been a member of the Association since 1920.

4. *Shannon* v. *Irving Trust Co.*, 275 N. Y. 95, 9 N.E. (2d) 792, 793, 794 (1937) (see cases cited bottom of page 794); *Cross* v. *U. S. Trust Co.*, 30 N.E. 125 (N. Y. 1892); *Hutchison* v. *Ross*, 262 N. Y. 381, 187 N.E. 65, 71 (1933).

5. *Liberty Bank* v. *New England Investors*, 25 F. (2d) 493, 495 (D.C. Mass. 1928); *Tate* v. *Hain*, 25 S.E. (2d) 321, 325 (Va. 1943); by analogy, *Germon* v. *Burdick*, 123 F. (2d) 924 (D.C. C.A. per Vinson, J., 1941).

6. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, 24 A. (2d) 309, (Del. 1942).

7. 89 *Univ. of Pa. L. Rev.* 360, 362 (1941).

8. 44 *Harv. L. Rev.* 161, 189 (1930).

9. 89 *Univ. of Pa. L. Rev.* 360 at 367.

10. *Harvey* v. *Fiduciary Trust Co.*, 299 Mass. 457, 13 N.E. (2d) 299 (1938).

11. *Baltimore Bank* v. *Central Public Corp.*, 28 A. (2d) 244, 245 (Del. Ct. of Chan. 1942).

12. *Haase* v. *Title Guarantee & Trust Co.*, 269 App. Div. 319; 55 N.Y.S. (2d) 428 (1945); aff'd in 295 N.Y. 761, 66 N.E. (2d) 120.

13. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, 24 A. (2d) 309, 313 (Del. 1942); *Wilmington Trust Co.* v. *Sloane*, 54 A. (2d) 544, 550 (Del. Ct. of Chan. 1947).

validity of the original instrument.[14] The law of the forum, Florida, was said to apply to administrative questions arising under a trust created in Minnesota and where the trust res was located; this because the trustor intended when he created the trust to establish his domicile, the domicile of the trustee, and the location of the trust res in Florida.[15] This language of the court seems to have been dictum since there was no administrative question before it.

The mere change of residence of the trustee to another jurisdiction would not of course change the law of the trust.[16]

It is to be noted that the present trends are stemming from the Eastern jurisdictions as no cases have been found involving these questions in the Western areas.

To summarize the present day tendencies in judicial decisions dealing with this entire subject, we quote the following language of the Delaware Supreme Court on this point,[17]

> The domicile of the donor is, of course, a circumstance to be considered in the ascertainment of the seat of the trust; but courts, today, are not so much inclined to the uncompromising pursuit of abstract doctrine. They are disposed to take a more realistic and practical view of the problem; and the donor's domicile is no longer regarded as the decisive factor. The place of execution of the trust instrument and the domicile of the beneficiaries are not important indicia. The domicile of the trustee and the place of administration of the trust—quite generally the same place—are important factors; and the intent of the donor, if that can be ascertained, has been increasingly emphasized.

14. *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A. (2d) 153, 163 (Del. Ct. of Chan. 1940).

15. *Warner v. Florida Bank*, 160 F. (2d) 766, 771 (C.C.A. 5, 1947).

16. *Swetland v. Swetland*, 105 N.J. Eq. 608, 149 N.E. 150, 151 (1930).

17. *Wilmington Trust Co. v. Wilmington Trust Co.*, 309 A. (2d) 312 (Del. 1942).

The Japanese Supreme Court Mission: Towards a New Legal Order in Japan

by James Perkins Parker • of the District of Columbia Bar

■ Sponsored by the Department of the Army and the Supreme Commander for the Allied Powers in the Pacific, six Japanese judges are touring the courts of the United States. Their mission is to study the operation of American justice so that they may carry back to their own country some of the democratic juridical principles that have been developed in this country.

■ For the first time in Japanese history, the judiciary has become a genuine and equal third branch of the Japanese government, independent of the executive under whose supervision it has heretofore functioned. The Supreme Court of Japan was established under the new Constitution in August, 1947, as the apex of a new court system. Perhaps the most important new authority conferred upon Japan's highest tribunal is the power of judicial review of all legislative and administrative acts. As a practical matter this power, which the former Supreme Court did not possess, makes the court the real guardian of the Constitution.

Japan will again take her place among the free and independent nations and the natural adjustments of her institutions will have to be shaped by her own people, drawing upon those established in other nations. These, however, cannot be borrowed from any other country without some modifications. But an understanding of American institutions should be of assistance in the changes necessary under the new constitution and this is particularly true in the field of law where our courts have had so important a part in safeguarding the liberties of the individual.

In order to provide the newly constituted judiciary an opportunity to observe the whole gamut of judicial administration in the United States, the Supreme Commander for the Allied Powers made it possible for a group of six Japanese judges, including the Chief Justice and two Associate Justices of the Japanese Supreme Court, to be conducted on a forty-five-day tour of the United States to study and observe the organization and functions of the American judicial system.

Basic Objective of Mission Is To Improve Japanese Justice

This project, known as the Japanese Supreme Court Mission, is sponsored by the Department of the Army and the Supreme Commander for the Allied Powers. The program, which began October 1, will include attendance at seminars conducted by leading authorities on American jurisprudence at a number of universities, as well as observation of actual proceedings before trial and appellate state and federal courts located in California, Massachusetts, New York, New Jersey, Wyoming and the District of Columbia.

The purpose of the mission is to enable the leader of the Japanese judiciary and his colleagues to study and observe the structure and operation of the United States Supreme Court as well as other representative federal, state and local courts. While the group spent considerable time in Washington and New York City, the program is kept flexible and, as time permits, visits are made to agencies concerned with judicial administration, several leading universities and the United Nations. The over-all objective of the mission will be to collect information of value in improving the dignity, efficiency and independence of the Japanese judiciary.

Group Is Composed of Six Judges

The mission comprises the newly appointed Chief Justice of the Supreme Court of Japan, two Associate Justices of the Supreme Court, the President of the Sendai High Court, and two judges of the Tokyo High Court, one of whom is the Chief of the Liaison Section, General Secretariat of the Supreme Court and the other of whom is Director of the Criminal Affairs Bureau of that Secre-

tariat. The judges are keenly interested in acquiring a better knowledge of the structure and operation of the United States Supreme Court, as well as of the highest state courts, and the trial and intermediate appellate courts of both the federal and state judicial systems.

All members of the group graduated from Tokyo University Law School. The Chief Justice, Tanaka, is 60 years old and formerly was Minister of Education and a member of Parliament. Early in his career he became a law professor and he is a prolific author of books and articles on legal, philosophical, historical, religious (Catholic) and other learned subjects.

One Associate Justice of the Supreme Court, Mano, is 62 years old, thirty-three years of which he spent as a practicing lawyer until his appointment to the Supreme Bench in 1947. He is a past president of the Second Tokyo Bar Association. The other Associate Justice of the Supreme Court, Hozumi, is 67 years old. After serving many years as Professor of Law in Tokyo Imperial University he served as Dean of the law faculty of that institution. He has travelled extensively in Europe and the United States where he studied the various systems of judicial administration on which he has written a number of books.

The Sendai High Court Presiding Judge, Ishisaka, is 55 years old and enjoys a position equivalent to that of a senior judge on a United States Court of Appeals. He was a Justice of the Supreme Court which was abolished when the new Constitution became effective on May 3, 1947. The two Supreme Court secretariat judges, Higuchi, age 43, and Kishi, age 42, were attorneys in the abolished Japanese Ministry of Justice and presently specialize in criminal cases on the Tokyo High Court which corresponds to the United States Court of Appeals.

The judges (except Judge Mano) have served in official capacities in Mongolia, Manchuria or China, but only Chief Justice Tanaka and Associate Justice Hozumi have previously visited the United States, Europe, and Central and South America. Judge Mano has been prominent in bar association activities and has served on the Public Office Qualifications Appeal Committee of the Japanese Cabinet during the Occupation.

The group thus represents a blend of intellectual interest which well equips it for an intensive survey of the Anglo-American system of law and justice to the end that the participants, upon their return to Japan, may be enabled to assume leadership in the current reorientation of Japanese jurisprudence.

Background of Japanese Law Explains Its Difficulties

The idea of a "national polity" of Japan and the ideal of an "imperial way" of Japanese life have changed radically and upon their return to Japan, the Chief Justice and his group should be in a position to more effectively assume dynamic leadership in perfecting the administration of justice and shaping the growth of democracy with practical skill and sagacity.

In old Imperial Japan anyone who possessed power was never at a loss to know how to use it; the sole question being who should possess it. As a result, in the new democratic Japan, it becomes harder for judges and lawyers to run a constitution than to frame one, for where a court might once follow the whims of a Ministry of Justice, it must now follow the views of a nation broadened by the concept of constitutional responsibility.

A clear and unambiguous concept of what constitutes the democratic way of administering justice is not, however, widely current among Japanese judges or lawyers. Their old system, adapted to the needs of a compact country with a highly centralized authoritarian government has been scrapped. In making this new judicial system work in a manner consistent with its democratic objectives, the Chief Justice of Japan and his colleagues must eliminate the bureaucratic ague which has retarded its growth.

Sweeping reforms in Japanese legal and judicial systems are being carried out under guidance of the Allied Occupation, but these can materialize only if the Japanese judiciary lives up to its new constitutional task. The full scope of these reforms will be found in an article in the August, 1949, issue of the *Washington Law Review*, (Vol. 24, No. 3) by Dr. Alfred Oppler, Chief of the Legislation and Justice Division, Legal Section of General MacArthur's Headquarters in Tokyo. Dr. Oppler, who was active in the organization of the mission, brought the Japanese judges from Tokyo to San Francisco and is accompanying the mission throughout its tour of the country.

Slowness of Justice Is Most Crucial Problem

The most crucial problem in the court procedure of Japan today is the slowness of the courts in both civil and criminal cases. Many things contribute to this condition, not the least of which is the fact that no shorthand is used in the reporting of court cases. There are relatively few shorthand experts in Japan since the language does not lend itself to any phonetic system. This is a tremendous handicap to the judge since every decision in both civil and criminal cases must contain a full written presentation of the facts and legal reasons on which it is based. The court reporters merely take down in longhand the gist of the proceedings so there is no complete record of the trial, and cases on appeal are practically tried *de novo* inasmuch as witnesses are often recalled for their testimony and documentary evidence is introduced all over again. Experiments being made with wire and tape recorders have not proved satisfactory.

In addition, the Japanese have not yet adopted the continuous trial system. A single court may be hearing fifty different cases on fifty consecu-

tive days and the unfinished case heard on the first day may not be heard again for two or three months, following which another day of trial is held. If a third day of trial is needed it may be another two or three months before the litigants get into court again. Consequently, a tradition has grown up among the populace that no one receives complete justice without three separate trials. Experiments are being made with the introduction of a continuous trial system and the tendency is to gradually shift over to that system.

There is no arraignment and plea system in Japanese criminal proceedings, consequently, except for petty offenses disposed of by summary procedure wherein the accused is not required to appear, all cases must be tried. American practitioners will find this in sharp contrast to our own system whereby a tremendous number of offenses, serious as well as minor, are speedily disposed of by pleas of guilty.

The Japanese courts have no authority to punish for contempt and as a consequence the litigant or the accused, as well as attorneys and witnesses are frequently somewhat casual in their promptness and attendance. Some cases have been marked by considerable disorder.

Nearly all Japanese attorneys are individual general practitioners, two-thirds of whom work at home. They have little or no clerical help and, due to the limitations imposed by the language problem previously mentioned, most of them draft and copy all of their own documents by hand. The limitations of this method become more apparent when it is realized there are only 6000 practicing lawyers among eighty million Japanese people.

The tremendous revolutionary changes made not only in the constitution but in the rules of procedure in practice since the end of the war have naturally brought about a certain degree of confusion. Many of these problems before the courts are thus being presented for the first time and neither the lawyer, the procurator nor the courts are familiar with them; the natural result being that they proceed cautiously and with considerable delay.

All Japanese judges and lawyers are genuinely aware of these deficiencies and show an avid interest in improving the situation. Many conferences have been held by representatives of SCAP and bar associations and judges in a continuing effort to solve all or some of these problems.

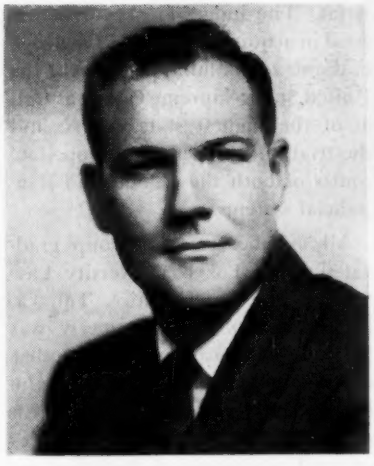
Program of Mission Is In Three Parts

(1.) *Instruction at Seminars.* In each area the program is providing for conferences between the Japanese judges and American judges, judicial officers and distinguished members of the federal and state Bars as well as law professors and scholars in the fields of jurisprudence and legal philosophy. These conferences are in the nature of seminars on the organization, structure, practice and procedures of the federal and state judicial systems. In addition, they are studying the formulation of American law and policy in the safeguard of personal liberty against abusive use while, at the same time, effectively checking excesses of extremists.

(2.) *Observation and Demonstration.* In each area the program includes observation of the United States judicial process, in order that the group will see the process in action after having been instructed in its nature and theory. Day-to-day demonstrations of trial techniques, appellate procedures, and the law enforcement and adjudicative processes, are a major part of the program and will include attendance at *nisi prius* trials, appellate arguments, and motion and equity calendars, covering civil and criminal cases of typical and varied types. The significance of what has been observed and demonstrated is being explained to the group, in order that in combination with the instruction at the seminars the group will gain a comprehensive understanding of the subject matter covered. The emphasis at all times will be on the practical, the specific, the concrete and the manner employed in solving the recurrent problems facing trial and appellate judges. Once the fundamental essentials have been expounded at the seminars and are understood by the Japanese, broad generalizations are avoided and the approach is pragmatic. In the elucidation of conceptual doctrines the application of those doctrines in the practical administration of justice is being stressed.

(3.) *Professional and Social Gatherings.* The Chief Justice and his colleagues are being presented to the Chief Justice of the United States and the members of our Supreme Court, to the Attorney General and other high justice officials, and to the judges, judicial officers and distinguished members of the federal and state Bars. In addition, organizations such as The Association of the Bar of the City of New York, the Council on Foreign Relations and the Institute of Pacific Relations in

(Continued on page 975)



James Perkins Parker, a member of the Florida and District of Columbia Bars, is now in active practice in Washington. A graduate of the University of Florida College of Law, he was designated by the Institute of International Education to serve as Escort-Consultant to the Japanese Supreme Court Mission during its forty-five-day tour of universities and courts in this country.

"Books for Lawyers"

SUCCESSFUL TAX PRACTICE. *By Hugh C. Bickford. New York: Prentice-Hall, Inc. 1950. $5.65. Pages 428.*

Procedure as the portal through which Justice must pass is the most important phase of the law. The young lawyer, fresh from law school, feels competent to deal with almost any question of substantive law, but he is certain to find himself poorly trained to cope with procedural law. *Successful Tax Practice* in a very readable style goes a long way to fill this void in a lawyer's tax education.

Hugh C. Bickford has had experience in the Bureau of Internal Revenue and has been engaged in active tax practice for over twenty-five years. Many points in *Successful Tax Practice* are illustrated from his own experience in trying such cases as the multi-million dollar suit of *Baltimore & Ohio Railroad Company* v. *Commissioner*, 30 B.T.A. 194, and the *General Utilities and Operating Company* v. *Commissioner*, 296 U. S. 200, which has become a landmark in corporate liquidation law.

"Practice" is a key word in the book's title. The author explains tax practice by starting with "the facts of the case". He stresses the importance of getting the facts and all the facts. After the facts have been determined they must be proved to the satisfaction of the trying tribunal. Mr. Bickford takes the problem of value and shows how it may be proved by establishing comparative facts, as in cases involving the troublesome question of officers' salaries or valuation of real or personal property and how value may be proved by comparative sales, capitalization of earnings and replacement costs. The demonstration is complete and includes a chart showing the best methods of proving the value of a representative group of properties. For example, a glance at the chart indicates that the replacement cost method and the capitalization of earnings method are equally appropriate for proving the value of airports and that the comparative sales method is inappropriate.

The author next explains various methods of preparing and presenting a case involving purely legal questions. The art of brief writing is distinguished from the art of rendering a formal or informal opinion. Many basic, but often disregarded, rules of legal research and brief writing are set forth for the education of the inexperienced and as a reminder to the experienced.

As an introduction to the section on how a case should be handled before the Bureau of Internal Revenue and in the Tax Court, Mr. Bickford devotes two chapters to the make-up and audit processes of the Bureau. He shows step-by-step how the agent's report should be protested. After the protest is filed, the reader is taken through a conference with the conference section and an appeal to the technical staff with instructions on how best to press his case before these bodies.

If the client has paid too much rather than too little, the reader is informed as to how to make a claim for a refund. If on the other hand, the client effectively claims the "claim for refund" in his return, the reader is told how the case should be handled throughout from negotiations with the technical staff to a trial before the Tax Court. This discussion is particularly valuable with regard to stipulating facts with the Bureau and the rules of procedure before the Tax Court.

Another key word in the title is "successful". The volume is filled with references and fine points of the law of procedure and the psychology of human relations that often make the difference between successful and unsuccessful tax practice. A good chapter on the preparation of returns is introduced by a statement about the importance of preparing tax returns as a source of new clients for the general practitioner. It is unnecessary to say that the successful practice of any branch of the law is founded upon getting and helping clients. Several hints, helpful particularly to young practitioners, lawyers and accountants, are given with regard to their relationship with clients.

The chapter on controlling the tax burden is designed to aid the general practitioner in doing what pleases clients most—making suggestions to save them money. However, Mr. Bickford appends several precautionary rules to his discussion of tax-saving plans. He suggests the possibilities of tax-saving plans with regard to abnormal income, damages recovered in a lawsuit, gifts, trusts, losses, sales and exchanges of property, and joint returns.

The book is filled with useful ideas and facts for the practicing lawyer and accountant. Mr. Bickford warns tax lawyers, for example, that if they desire a conference after protesting a thirty-day letter, a request for such a conference should be contained in the protest. The reader is warned that on an appeal to the technical staff new issues not considered by the agent may be raised and never to settle a case without consulting the client and having him sign the agreement form.

Taxation is a highly technical and profitable field. The need for a book such as *Successful Tax Practice* has long existed. The volume provides many of the answers which cannot be found elsewhere except after hours of research and gives practical

suggestions with regard to the technical points of the tax law. The completed forms which the author has supplied to illustrate his points are excellent models for the practicing attorney to follow in similar cases.

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THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN. *Translated by Kurt Wilk, Introduction by Edwin W. Patterson. Cambridge: Harvard University Press. 1950. $7.50. Pages xliii, 493.*

This is a rare volume. It will richly repay a second and even a third reading. Its subject matter is legal philosophy; that is, analysis of the fundamental conceptions that underlie jurisprudence and a determination of their value. The volume consists of the English translation of three books. One was written by Emil Lask, a German philosopher, who, after leaving the legal profession, distinguished himself in the field of philosophy. The second was written by Gustav Radbruch, a member of our profession, who was Minister of Justice under the Weimar Constitution. And the third came from the pen of Jean Dabin, a Belgian, who is an instructor in law at the University of Louvain. None of the three confined himself to the law of a single country; all three employed a world outlook.

The sponsor of this volume constitutes for it a good recommendation, for it was published under the auspices of the Association of American Law Schools. The editorial committee of that organization chose the books that comprise the volume. The title, *Legal Philosophy*, may repel the interest of some members of our profession, for lawyers like to deem themselves practical men and often manifest distrust of the philosophical mind. Those who can overcome that inclination will gain much from a reading of this book. It will broaden their learning and add interest to their daily work.

Someone has said, "The heedless walk through deserts where the observant find many precious things." A volume which will enable the busy lawyer to find new interests—precious things—as he performs his daily chores is a friend worth having. The three writers, in analyzing the source of law and in exploring legal principles, such as ownership and contracts, reveal ancillary ideas which will constitute for most readers new subjects for speculation. By way of illustration, the following is taken from Radbruch:

> It is therefore possible to determine as the legislative will what never existed in the conscious wills of the authors of the law. The interpreter may understand the law better than its creators understood it; the law may be wiser than its authors—indeed, it *must* be wiser than its authors. The thoughts of the authors of a law necessarily have gaps, cannot always avoid obscurities and contradictions; yet the interpreter must be able to derive a clear and uncontradicted decision from the law in any conceivable legal case.

Here is another illustration of the statement that this book can help the practitioner to find previously undiscovered precious things in the law:

> This character of custom as a preparatory school of law and morals explains the degeneration of custom which occurs as soon as law and morals have evolved as independent cultural forms and separated from each other. . . . "Not morality rules the world, but a hardened form thereof, custom. The world as it has come to be forgives a violation of morality more readily than one of custom. Happy the times and the peoples where custom and morality still are one!" But the most impressive criticism of custom—as well as of law—has been made by Leo Tolstoy. Again and again we meet in his novels the contrast between the goodness without form of the lower classes of people and the forms without goodness of "society."

Law is not a divertisement which the State has fashioned for those who care to joust in the forum, nor is it a science or a social philosophy disparate from all others. It is a part of the social order. Frequently it is so difficult to distinguish between law on the one hand and morals or custom on the other that the legal philosopher finds ample occasion to consider the problem as to what is law. Society is vitally concerned with every letter of the law, and the thoughtful man in the street sees in it some of the elements of a philosophy and enough of the practical sciences that he hopes that jurisprudence through its own momentum may keep pace with the progress of the day. Law has a social function to perform, and next to religion lies nearest to the human heart. Dabin points out:

> The law is the image of life and under its influence. Now life does not proceed in a compact and rectilinear manner; it advances by uncertain, discontinuous steps and not at the rhythm of a mathematical development.

It was Judge Cardozo who declared that one of the great needs of the law today is "a philosophy that will mediate between the conflicting planes of stability and progress and supply a principle of growth". Lask evidently is hopeful that legal philosophy can serve that purpose, for he speaks of its possibility "to fathom the law's absolute significance and its relations to other absolute values".

Although the three treatises deal with the same subject, they are by no means counterparts of each other. The introduction to the volume says:

> Each of the three writers tries to place law in the context of some more general and abstract philosophy. Here they part company. For Emil Lask and Gustav Radbruch the starting point of legal philosophy is to be found in the work of Immanuel Kant. For Jean Dabin the basic context is the philosophy of Saint Thomas Aquinas.

Lask's treatise, which is the shortest of the three, is expressed in terms which are purely abstract. Lawyers unfamiliar with the idiom of philosophical treatises may experience difficulty with Lask's style. His book, however, produced a profound effect and influenced Radbruch's point of view. Lask's purpose was to reveal the place of legal philosophy and legal science in the cultural sciences.

Radbruch's book begins with an unfolding of the underlying princi-

ples of legal philosophy. While some may deem that part of the book difficult, all will find valuable his analysis of such concepts as ownership, inheritance and procedure. Radbruch points out that justice is not the exhaustive principle of law; it needs, according to him, the complements of expediency and certainty. He deems equity as "the justice of the individual case", governed, however, by a principle "susceptible of being elevated finally to a general law". His literary style is delightful and his knowledge of the classics enables him to develop his meaning with analogies which add aesthetic value to his intellectual effort. Although the charm of his language is one of the delightful features of the book, the irony of the situation enables him to make this observation:

> The language of the law is frigid, renouncing any emotional tone; it is blunt, renouncing any argumentation; it is concise, renouncing any intention to teach. Thus there comes into existence a lapidary style of self-imposed poverty, a style which cannot be surpassed as an expression of self-assured consciousness of power, of the commanding state. . . .
>
> Whereas the language of the law is the cold lapidary style, by odd contrast, glowing rhetoric is the language of the fight for rights of the fighting sense of law.

Dabin's book, which is the longest of the three, will seem more natural to the American lawyer than those of Lask and Radbruch. It has less of the philosophical and concerns itself more with matters which the lawyer as a practical man deems the source of his bread and butter. A substantial part of his effort is to determine the law's applicability to the institutions of today. As he proceeds he lays bare some subordinate conceptions which are bound to be valuable to the lawyer who likes to acquire new impressions. For instance, he shows that the law often confines itself to a more limited view of an institution—for example, marriage—than the layman's. The following, taken from his writing, illustrates the observation just made:

> What is marriage for the jurist? Simply cohabitation combined with mutual material aid. Husband and wife live together and have the right to do so as the result of a solemn agreement, which is the act of celebration of the marriage; having contracted the marriage, they are bound to live together in mutual faithfulness and to render mutual aid to each other. Now such a definition, which is limited to the external side of things—the common life, habitation in the same *domus*—is far from expressing the science but simply the reality of marriage. It barely suggests the carnal union, whereas marriage is the total fusion, body and soul, of two human personalities, man and woman, with a view to the propagation of human kind and to their own perfection.

Lask, in his abstract manner, developed the same thought. For instance, he pointed out: " 'Property' no more coincides with the physical thing than the 'person' does with the human being."

Those who view with misgivings the constant expansion of the powers of government will read with approving eyes the manner in which Dabin shows that the term "jurisprudence" is the equivalent of legal prudence. Having shown that jurisprudence should be legal prudence, he goes on:

> For prudential reason is not confined to the disposition of single cases, to professional consultation or the decision of a lawsuit. There is the prudence of legal counsel (the Roman "prudent") and the prudence of the judge, the latter providing the origin for the [French] technical term *jurisprudence* to designate the work of legal creation and interpretation done by the courts. But there is also a *legislative* prudence, concerning the particular action of elaboration of the general rules designed to govern individual cases. This legislative prudence will guide the operations of all those who, in whatever capacity, collaborate in the building of the law. . . .

Although the lawyer deems himself a practical man, he is coming to see ever more clearly that law is not a mere matter of rote. He is realizing more and more that back of the law is a social philosophy and that back of any given number of cases is a right principle of law. Prior decisions, even though their number may be impressive, may have failed to catch the very object of the search, the right principle. The consciousness is bearing in upon us that the lawyer's duty to his client and to society demands that he do something more than find a case in point; he must find the correct principle. A knowledge of comparative law, and indeed of legal philosophy, may be indispensable to transform the lawyer in his library from a mere technician into a profound lawyer.

If Lask's treatise is difficult reading for the lawyer, possibly the blame should not be laid upon Lask; perhaps our law schools are at fault in failing to give the student an acquaintance with comparative law and legal philosophy.

The foregoing is by no means an adequate analysis of the merits of this volume. However, the column heading under which the JOURNAL carries its reviews is entitled "Books for Lawyers". Possibly the foregoing suffices to enable the reader to determine for himself whether he cares to read this book. The observation made at the outset, "This is a rare volume. It will readily repay a second and even a third reading." is now repeated. The purpose of legal philosophy is not to act as a reformer, nor is it even to give the answers. Radbruch himself states: "Philosophy is not to relieve one of decisions, but to confront him with decisions. It is to make life not easy but, on the contrary, problematical." This book will give its reader a broadened interest in the law, new material for his thoughts and, what is more important, an expanded knowledge of jurisprudence.

GEORGE ROSSMAN

Supreme Court
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THE GROWTH OF AMERICAN LAW, *The Law Makers. By James Willard Hurst. Boston: Little, Brown and Company. 1950. $5.50. Pages xiii, 502.*

In this spacious and well-written book, Professor Willard Hurst of the University of Wisconsin Law School has attempted a task of awesome proportions. He has set out quite boldly to tell his fellow law-

yers and all interested laymen the story of the growth of American law, especially of the way in which that law has been developed by what he considers to be our five principal law-making agencies: the legislatures, the courts, the conventions and other constitution-giving institutions, the Bar and the executive-administrative branch. The limits of the study are set—somewhat logically, somewhat arbitrarily—as 1790-1940. He has done this by examining each of these five agencies at length—showing how each was established, how it has grown, what seem to be its essential characteristics, how it does its work, and in particular what are its significant "social functions" as a law-making instrument.

The author sees these five agencies essentially as mediators among competing interests and pressures. The product of their mediation is what we know as "law", and as such American law "has been more the creature than the creator of events", always and everywhere "an instrument of social values". And the way in which this mediation has been carried through, the protean and little-understood interplay between the law and changing economic-social-political forces that in turn creates more law and new law, is the subject to which Professor Hurst has devoted his learned attention. The function of the Bar as a law-making agency is especially well described, and no lawyer with any concern for his own social value will want to miss Part V.

In a very real sense, as Professor Hurst acknowledges repeatedly and gracefully, this volume tells only a fraction of the story of the development of American law, and serves rather as an introduction to future studies of his own (I hope) and of other men (I am sure). If this book comes to be, as its publishers think it might, "a landmark, not only in historical writing but in a movement to insure for all Americans a better understanding of our legal system", it will be as the first rather than last word on a tremendously vital and perplexing area of social knowledge. It is the virtue of *The Growth of American Law* that it opens up more questions than it answers, and that it points with neither pride nor scorn to the many areas of sheer ignorance in our collective understanding of American legal history. With this admirable book those areas begin to shrink. It will be read with profit by even the most learned and sophisticated lawyers, political scientists and legal historians.

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FEDERAL FOOD, DRUG, AND COSMETIC ACT. *Judicial and Administrative Record, 1938-1949. By Vincent A. Kleinfeld and Charles Wesley Dunn. Chicago: Commerce Clearing House, Inc. 1950. $17.50. Pages xxvi, 895.*

Since the passage of the Food and Drugs Act of 1906, a steady though moderate flow of judicial and administrative decisions has issued from the courts and the agency responsible for administering the law. In 1934 the Department of Agriculture, which was then responsible for the administration of the Act, published a collection of cases construing it. After the passage of the Food, Drug, and Cosmetic Act of 1938, in which the coauthor of the book, Charles Wesley Dunn, played a prominent part, the need for a comparable collection of cases decided under the new Act came to be felt by attorneys working in this field. The book under review was the eventual answer to this need. As Mr. Dunn explains in his foreword, "We jointly developed the plan for the book, but Mr. Kleinfeld alone prepared its contents."

In preparing the volume Mr. Kleinfeld, who is in charge of food and drug law matters in the Department of Justice, went far beyond the earlier collection of the Department of Agriculture: not only are virtually all of the cases decided under the 1938 Act included, many of them not reported elsewhere, but each one is introduced with a headnote relating it to the relevant portions of the Act, and the cases are subtitled to help the busy reader. Many of the proceedings in federal district courts are available only in the form of instructions to the jury, but these are often of considerable value to the practitioner and are included as they were in the 1934 collection.

Perhaps even more useful than the 560 pages of cases is the section containing the Trade Correspondences or informal opinions of the Food and Drug Administration on the new Act from 1938 until 1946, when the passage of the Administrative Procedure Act made it necessary to publish such material in the *Federal Register*. These Trade Correspondences are of great utility in indicating the views of the Food and Drug Administration toward numerous specific problems of interpretation of the Act and have not hitherto been available in any other published form. The comparable opinions from the *Federal Register*, much reduced in volume apparently in reaction to the requirement of publication, are included also. An exhaustive annotation of the Federal Food, Drug, and Cosmetic Act follows, showing section by section the applicable regulations, Trade Correspondences, opinions of the Attorney General and cases. Since many sections correspond to sections of the 1906 Act, references to the pertinent cases decided under that Act are included. The 1938 Act and several brief related enactments are reproduced and a section on forms shows the principal forms in common use in federal food and drug law practice. These are of unusual value for the lawyer who is not a specialist in the field.

The index deserves special mention; unlike the indices of so many law books, it is precise and comprehensive. Applying the test that a reference book is only as good as its index, this book is very good indeed.

From the point of view of the specialist in the trade regulation field, this excellent book still leaves a gap between the 1934 publication

of the Department of Agriculture and the book under review, consisting of the cases under the 1906 Act between 1933 and 1938. Fortunately current material is now available in the *CCH Food Drug Cosmetic Law Reporter*. Possibly The Food Law Institute, of which Charles Wesley Dunn is president, will undertake to publish these cases so that the case law on food and drugs from 1906 to the present will be readily available.

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CASES AND OTHER MATERIALS ON WORLD LAW. *The Interpretation and Application of the Charter of the United Nations and of the Constitutions of Other Agencies of the World Community. Edited by Louis B. Sohn. Brooklyn: The Foundation Press, Inc. 1950. $8.00. Pages xxii, 1363.*

Readers who have been following The Development of International Law, edited for the JOURNAL each month by Louis B. Sohn of Harvard Law School, will be interested to know that Mr. Sohn has completed a massive volume to introduce law students to "world law". Although the phrase "world law" is not his own invention, as the author admits, it may be that this volume will bring it into general use to describe that long dormant subdivision of international law that might be called international constitutional law, or the legal ordering of an international organization and national states.

The book is the result of Mr. Sohn's pioneer course in Harvard Law School on world organization for which he laboriously constructed his own casebook on the mimeograph, as it were, tested it in the crucible of class discussion and finally drastically cut the materials to reach the publishable maximum of pages. A comprehensive bibliography, artfully placed on page one to assail the student instead of in an appendix to be neglected, initiates the discussion, and briefer bibliographical notes precede each chapter and many sections. General principles of interpretation of world constitutions, the weight to give to preambles and the special problem of exceptions as to domestic jurisdiction introduce the student to world law with materials drawn from the jurisprudence of the League of Nations Covenant as well as nonjudicial sources on the United Nations Charter. Membership in international organizations, the rights and duties of states, and international assemblies are then covered with a similar combination of judicial and nonjudicial materials.

Problems in the Economic and Social Council and the Trusteeship Council of the United Nations are explored in chapters that serve also to suggest to the student the important international agencies affiliated with the United Nations. The powers and functions of the Security Council, the focus of authority in the United Nations, are carefully examined and the maintenance of the peace is considered in the light of the Security Council's achievements and shortcomings. The chapter on international courts and judicial processes is fittingly brief since world law is still undergoing the transition from the purely political to the judicial level.

World government proposals complete the book on a hopeful note. An appendix collects some of the international constitutions from the League Covenant to those of the more important agencies affiliated with the United Nations.

Since most American law schools either do not offer a course in international law, much less world law, or else make it an elective for a mere handful of students, *Cases and Other Materials on World Law* might be considered to be of limited value to legal education. Having used Mr. Sohn's book as well as having taught a traditional international law course with one of the stiffly traditional casebooks, the writer has found students enormously more interested in world law than in traditional international law, which has mainly been of interest to a tiny specialized segment of the profession. If international law, at least as generally covered in casebooks and taught in law schools, has failed to make its way in law school curricula, then world law may prove to be the proper replacement to meet what is becoming a demand for international legal training for attorneys.

Whatever may be the fate of the United Nations as we know it, the establishment of an international legal order must continue on the basis of the hard lessons it has taught. *Cases and Other Materials on World Law* introduces students to the legal aspects of these experiences so that, as a legally-trained citizen in a national legal order, he can apply his legal training to the problem of an international legal order, or, as the House of Delegates has phrased it in establishing its special committee, the problem of "peace and law through the United Nations".

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GOVERNMENT BY DECREE. *By Marguerite A. Sieghart. London: Stevens and Sons, Ltd.* 1950. 30 s. Pages xix, 343.

Ideals sometimes fool us. We talk of a government of laws and not of men[1] and suddenly wake up to find ourselves in an impenetrable jungle of administrative bodies, state and federal,[2] representing not administrative law but administrative lawlessness.[3] Always tempted to simplify the complex, we tend to carry over in our minds our schoolday's neat picture of a tidy governmental universe in which one department makes the

1. Harrington's Oceana, 1656.

2. In 1936 when Robert E. Cushman joined the staff of the President's Committee on Administrative Management no information was readily available about why regulatory commissions had been created and a wide and highly important area in the field of public administration lay almost entirely unexplored. See his *The Independent Regulatory Commissions* (Oxford U. Press, 1941). Gerard C. Henderson's *The Federal Trade Commission* appeared in 1925, I. L. Sharfman's *The Interstate Commerce Commission* in 1931.

3. See for example, Roscoe Pound, *Administrative Law*, (Univ. of Pittsburgh, 1942).

law, another executes and the third adjudicates. And then we find clients of ours prosecuted, tried and convicted by the same governmental department and for violation of some rule made by the department on its own authority[4] and buried perhaps in the recesses of a governmental bureau.

In 1916 Elihu Root referring to the inevitable development of administrative law said that before regulative agencies "the old doctrine prohibiting the delegation of legislative power had virtually retired from the field and given up the fight".[5] In 1929 Lord Hewart of Bury, Lord Chief Justice, in *The New Despotism* launched a vigorous attack on administrative lawlessness. In 1932 James M. Beck published *Our Wonderland of Bureaucracy*, subtitled "A Story of the Growth of Bureaucracy in the Federal Government and Its Destructive Effect Upon the Constitution". The next year the American Bar Association appointed a committee on administrative law and later the President appointed an Attorney-General's committee on the same subject. Before that committee made its report, the Association's efforts resulted in the passage of the Walter-Logan Bill in 1940. But the bill was vetoed. Further efforts of the Association, however, led to the adoption of the Federal Administrative Procedure Act approved by the President on June 11, 1946.[6]

Criticism of administrative agencies has been directed to their [illegible] functions of adjudication[7] and legislation.[8] Both functions have been objected to as violating the principle of separation of powers; adjudication as violating a natural law principle that the same person should not be prosecutor and judge or the due process right to hearing; legislation as usurping legislative power. The book now under review relates to administrative law—meaning: the problem of delegated legislation.

Carleton K. Allen of Oxford, whose *Law and Orders* published in 1945 revealed the dangers of delegated legislation in England, contributes a foreword pointing out that "in the whole galloping process of delegation there has been no coherent system or uniform principle". "Democracies", he says, "have been driven, either by necessity or conviction to another type of government which . . . can end only by being authoritarian and irresponsible." Administrative law in England "though it exists for all but the blind to see, is neither acknowledged nor regulated". The issue before us is "how to organize the existing administrative law in order to give the greatest possible protection to the individual".

The first part of this book is devoted to a history of the ordinance in England. "The main difference between the English and the French method of judicial control", says Mrs. Sieghart, "lies in the fact that in England the general jurisdiction over litigation to which the administration is a party belongs to the ordinary Law Courts, whereas in France it belongs to adminstrative Tribunals and foremost to the Council of State. The English system, which in the past offered the highest guarantees against any abuse of administrative powers, has lost much of its value in modern times . . . . It may therefore at least be open to doubt whether the protection of the individual against the State is better secured in England than it is in France or was in Imperial and Republican Germany."[9]

Surely this last statement will come with surprise to many an American lawyer who, perhaps influenced by Dicey and his long-accepted but incorrect denial of the existence of administrative law in England,[10] thinks of England as preeminently enjoying the rule of law. If there be so little protection against administrative power, American lawyers may well ponder the reasons given for this loss of liberty. They may ask themselves whether these reasons exist in this so-called land of the free. The first is that "modern administrative legislation tends to restrict" the general administrative jurisdiction of the law courts "by creating a great variety of administrative Tribunals with specialized jurisdiction" and to

4. For a related case see *Securities and Exchange Commission v. Chenery Corporation*, 332 U. S. 194, 67 S. Ct. 1575, 1760 (1947), wherein an order of the Commission was sustained by a majority of the Court, though as Justice Jackson dissenting said, "there admittedly is no law or regulation to support" it.

5. Address as President of the American Bar Association at Chicago in his *Addresses on Government and Citizenship* (Cambridge, 1916) 535.

6. C. 324, 60 Stat. 237, 5 U.S.C.A. 1001-1011. For history see: 31 *A.B.A.J.* 615-624, 629; 32 *A.B.A.J.* 247, 253, 325, 341, 377-386; 56 *Yale L. J.* (1947) 670-705; 41 *Ill. L. Rev.* 368 (1946); 41 *Am. Pol. Sci. Rev.* 271-275 (1947); 79th Congress, 2d Session (1946), Senate Doc. No. 248; Gellhorn, *Administrative Law* (2d ed. Brooklyn, 1947) 1083-1118. For anticipatory state statutes see N. D. Laws 1941, c. 240, 25 *J. Am. Jud. Soc.* 114 (1941); Gen. Code Ohio 1943, amended 1945, §§ 154-61 to 154-74; Wis. Laws 1943, c. 375 (1944 Wis. Law R. 214); Va. Acts of Assembly 1944, c. 160; Calif. Stat. 1945, cc. 867-869; Lans. Ill. 1945 Sen. Bill 117; Pa. Acts 1945 No. 442, The National Conference of Commissioners on Uniform State Laws in October, 1946, approved a Model State Administrative Procedure Act. See Milton M. Carrow, *The Background of Administrative Law* (Newark, 1948) 4, 182-190.

7. See, for example—as to England: William A. Robson, *Justice and Administrative Law* (2d ed. London, 1947), Carleton K. Allen, *Bureaucracy Triumphant* (London 1931); as to the United States: Report of the Attorney General's Committee on Administrative Procedure, 77th Congress, 1st Session (1941) Sen. Doc. No. 8; John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, 1947); Frederick F. Blachly and Miriam E. Oatman, *Administrative Legislation and Adjudication* (Washington, 1934); Warren H. Pillsbury, "Administrative Tribunals", 36 *Harv. L. Rev.* 405, 483 (1923). Ray A. Brown, "Administrative Commissions and the Judicial Power", 19 *Minn. L. Rev.* 261 (1935); W. Ivor Jennings, "Administrative Authorities and the Courts", 17 *Jour. of Comparative Legislation* 210 (1935-3d series, Part III); "Report of the Special Committee on Administrative Law", 61 *A.B.A. Rep.* 721; James M. Landis, *The Administrative Process* (New Haven, 1938). As to separation of powers see 58 *A.B.A. Rep.* 409, 59 *id.* 541; 60 *id.* 141; 61 *id.* 725; 62 *id.* 789; 63 *id.* 331; 64 *id.* 575; 66 *id.* 439; Beck, op. cit. at 165-178; Hewart, op. cit. at 1-58.

8. Hewart, op. cit. at 79-102; Blachly and Oatman, op. cit.; Dickinson, op. cit.; 57 *Harv. L. Rev.* 558 (1944); 6 *La. L. Rev.* 309 (1945); 31 *Va. L. Rev.* 1 (1944). On delegation of legislative power, see L. L. Jaffe, 47 *Col. L. Rev.* 359-376, 561-593 (1947); Bernard Schwartz, *Law and the Executive in Britain*, (N. Y. 1949); on distinction between legislation and adjudication see 56 *Yale L. J.* 670 (1947); 48 *Mich. L. Rev.* 57 (1949); between rule-making and administration, 95 *Pa. L. Rev.* 622-627 (1947). For other criticisms see Ludwig Von Mises, *Bureaucracy* (N. Y., 1944); John H. Crider, *The Bureaucrat* (Philadelphia 1944). See also Dwight Waldo, *The Administrative State* (N. Y. 1948).

9. Pages 72-73.

10. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed. London 1939) 330, 194. Between his first edition in 1885 and 1915 Dicey modified his views somewhat. See his "The Development of Administrative Law in England", 31 *L. Q. Rev.* 148. For criticism of Dicey see Freund in *Growth of American Administrative Law* (St. Louis, 1923); W. Ivor Jennings, *The Law and the Constitution* (3d ed. London 1943) 210, 217, 245, 285-297.

"deny any right of appeal, even on a point of law, to the ordinary courts". The second is the great increase of discretionary powers: "In modern times the English administration is given such a vast range of discretionary powers by Parliament as to make the question of legality or illegality appear of secondary importance only."[11]

American lawyers may also ponder, especially as we verge towards a third World War, the author's statements that apart from Divine Right the necessity of meeting emergencies has been a chief justification for assertions of executive powers. "The exceptional is rapidly becoming the habitual, though the powers called upon to deal with it are still extraordinary powers. But they are no longer claimed solely in the name of emergency; a new conception has arisen which tends to supplant emergency as the main reason for an 'unfettered' government: its name is—efficiency."[12] Should not we Americans who have pragmatically created one administrative agency after another with little thought of the long-run and cumulative consequences, should not we Americans with our worship of efficiency be on our guard against such a facile descent into the abyss?

We know that legislative power delegated by Parliament is old. A famous early instance is the Statute of Proclamations of 1539. We know that it was given great impetus by the Industrial Revolution as exemplified in the Factory Acts.[13] We know the reasons given for increased legislative delegation: lack of time, need for prompt, preventive rules and of continuous regulation by a permanent body of experts, complexity of problems, avoidance of harmful rigidity.

Furthermore, "The circumstances under which administrative regulations are prepared are conducive to proper drafting, since the subject matter can be studied with especial reference to the needs of active administration and can be arranged in a logical and intelligible manner, uncontrolled by the exigencies of parliamentary procedure."[14]

We know also the disadvantages of delegated legislative power: conflicting rules by independent administrative bodies, lack of consistent unified policy, secrecy, temptations to sacrifice general interests to special and public point of view to that of the specialized, power-seeking expert.[15] But the great danger comes from the temptation of legislative bodies, not agreed on a policy or seeking compromise or the avoidance of responsibility for policy, to pass policy-making decisions to administrative bodies by vague, ambiguous or sweepingly general statutes. The danger here is vast in that such statutes give the courts no basis of control even if the statute by its terms does not attempt to exclude judicial controls.[16] If the legislature does not control and the court cannot, then there is no control. And American lawyers, thinking of congressional legislation, will note the statement in this book with respect to Parliament: "It is not lack of time or lack of expert knowledge, but lack of agreement which is primarily responsible for the wide delegation of powers in all questions of economic planning."[17]

If delegated powers had their dangers when *laissez faire* was still alive, what of the era of planned economies? When a great battle is pending determining the future of American life, whether regulated or free, when economists, political scientists, sociologists, lawyers, judges, publicists and statesmen are debating the approach of a welfare state or a socialist or communistic one, are these decisions to be made by the elected representatives of the people or by anonymous and therefore irresponsible administrators? If there be criticism of a State Department on the ground that vital questions of foreign policy and of internal security have been determined by persons never consciously given authority by the American people, persons whose philosophy they would condemn, what of administrative law-making when law shapes society and controls the economic activity and the life of every man?

Certainly the law must change; it must have a certain measure of flexibility. But we note the author's words: "The best proof of the difficulty with which all economic legislation is beset can perhaps be seen in the requirement, stressed again and again in recent times, for greater elasticity and flexibility of modern law. This . . . means—provisions for easy and *unobtrusive* change. For this becomes a means for political experiment."[18]

The problem is one of safeguards, assuming that legislative bodies can be made to realize the threat of administrative absolutism implied in uncontrolled legislative power, and assuming that legislative bodies, particularly Congress, are unwilling to abdicate or avoid their constitutional responsibility as representative of the people. Parliament has resorted to three methods of control: (1) Retaining a right of scrutiny, (2) a right of annulment by simple resolution, (3) the right of confirmation by simple resolution.[19] Scrutiny is least effective, required confirmation most. But lack of time prevents effective control and even a select committee set up in 1944 to watch administrative legislation has confessed its inability to cope with the problem because of its overwhelming magnitude.[20] And it is significant of increasing administrative autonomy that the requirement of antecedent publicity contained in the Rules

(Continued on page 973)

11. Pages 72-73.
12. Pages 77-78.
13. Cecil T. Carr, *Delegated Legislation* (Cambridge, Eng. 1921) 50; Instances of delegated legislation go back to the fourteenth century. J. A. G. Griffith, "The Constitutional Significance of Delegated Legislation in England", 48 *Mich. L. Rev.* 1079-1120 (1948). O. Douglas Weeks, "Legislative Power versus Delegated Legislative Power", 25 Geo. *L. J.* 314 (1937); Dickinson, *op. cit.*; at 10; John B. Cheadle, "The Delegation of Legislative Functions", 27 *Yale L. J.* 892 (1918).
14. Report of the Attorney General's Committee, cited above; Blachly and Oatman, *op. cit.* at 43-46.
15. Blachly and Oatman, *op. cit.* at 46-49.
16. Vague language excludes challenge for *ultra vires*. See e.g., page 121.
17. Page 113.
18. Page 114. The italics are the reviewer's.
19. Page 123.
20. Page 127.

LONDON LETTER

H. A. C. Sturges • Librarian and Keeper of the Records, Middle Temple

■ The opening session of the Third International Congress of Comparative Law was held in Lincoln's Inn Old Hall on July 31. Professor R. W. Lee, who presided, said that the Congress was to have been held at The Hague but, as the Palace of Peace was not available, it was transferred to London at short notice. The new President chosen was Dr. Roscoe Pound of Harvard University. In extending a welcome to the 200 delegates the Lord Chancellor, Lord Jowitt, said that the study of comparative law was a subject which was assuming increasing importance. It was a strange thing that this branch of legal study should have been until recent times under somewhat of a cloud which was nowhere more black and lowering, he was ashamed to confess, than in this country. What could be more sensible when faced with a problem than to examine what had been done by others when faced with a similar problem? And yet there had been remarkable reluctance in all countries to adopt this method of approach. Lawyers, of course, were conservative people and they were also generally very busy, or tried to be. All their time was taken up now in keeping pace with the mass of legislation and orders produced inevitably in their own countries under modern conditions of government, so that it was not physically possible for them to make themselves aware of what was going on in other countries. Another of the occupational diseases of the legal profession was complacency. They all knew that their system was best and that they had nothing whatever to learn from others. Indeed their own purity might be defiled by an over-sophisticated knowledge of the raffish practices of others. The common law lawyer looked down his nose at the rigidity of the civilian, and the civilian was aghast at the looseness and uncertainty of the common law. Those were all things which had tended to impede the growth of comparative law, but they had not been able to stop it because other factors, tending in the opposite direction, had been at work. Comparative law had come to stay, continued the Lord Chancellor. We were all becoming increasingly aware that this was one world and that there was no room any longer in it for the extremes of nationalism. It was in the power of man not only to destroy civilization but our whole physical world, and it was obvious that we were faced with the absolute necessity of establishing the Rule of Law internationally if man was to survive.

Dr. Roscoe Pound delivered the first address on the development of American law and its deviation from English law. He said that what appealed to him in the study of the subject was the persistence and vitality of the traditional system that we called the common law. If one looked back over history one saw the common law prevailing in conflict with very strong antagonists both in England and the United States. They might well believe that that vitally persistent common law tradition would continue to hold its place among the Anglo-American if not among the whole English-speaking people.

Middle Temple Admission Registers

It is with some diffidence that the writer ventures to note the publication of one of his own works and, in fact, he would not so venture were it not for the continued demand for information from numerous correspondents in America for information respecting ancestors who were members of the Middle Temple. The Registers of Admissions to the Honourable Society of the Middle Temple from the fifteenth century to the close of the year 1944 were published for the Society, during the Treasurership of Her Majesty the Queen, by Messrs. Butterworths & Company of Bell Yard, Temple Bar, in three volumes. The available records of the Middle Temple go back to the year 1501, but it has been possible, from other sources, to include a number of names of members of the Inn who were admitted prior to that date. Unfortunately, the original records concerning the period 1524 to 1550 are lost, but an attempt has been made to supply particulars from elsewhere, and it is believed that the list for the lost years is nearly complete. From the commencement of the Records to April 20, 1853, inclusive, entries of admissions were made in Latin. From April 28 in that year they appear in English and are so continued to the present day. The Latin entries have been translated into English throughout. All admissions to the Inn to the end of 1944, as stated, have been included, but it has also been possible to note all Calls to the Bar, appointments to the Bench, election of Readers and appointments of Treasurers up to the time of going to press at the end of Trinity Term, 1949. Associate and Honorary Masters of the Bench, of which there are several distinguished lawyers and others from the United States, have also been included.

THE PRESIDENT'S PAGE

CODY FOWLER

■ The Annual Meeting in Washington, D. C., was an outstanding success. More than 3000 of our members registered and many were accompanied by their wives. The lawyers of Washington and their wives were most gracious hosts and hostesses to the members of the Canadian and American Bars. The entertainment planned for the ladies was also unusually interesting.

It was our first meeting with our friends of the Canadian Bar Association and while each Association held its own meetings, there were many activities, including entertainment, in which both Associations participated. The greatest contribution was the good will engendered between the members of both Associations and the establishment of many close friendships. I believe that this joint meeting not only brought closer together the two Associations, but our two countries as well. If any had doubted that a joint meeting could be a success, those doubts should now be dispelled.

Following the Annual Meeting, I was honored by being asked to speak at the dinner given on September 25 by the Federal Bar Association in honor of the Supreme Court of the United States and the members of the Judicial Conference of the United States in Washington, D. C. This outstanding Association has an unusual opportunity for constructive service to our profession and the nation.

The programs for Regional Meetings to be held in parts of the country where an Annual Meeting of the Association has not been held recently (see October issue, page 840) are developing quite satisfactorily. I believe our members who attend the meetings will find them beneficial and interesting. The dates and locations of these meetings will be announced later.

I have asked the Sections and committees to prepare articles which we trust will be of interest to the general practitioner. I should like to see more of these articles carried in the JOURNAL. My hope is to have this material of a practical and useful character on questions that confront lawyers in their daily work. The Section and committee chairmen have agreed to furnish articles of this nature.

We have been asked by some state bar associations to use some space in their journals. This we are most happy to do. With the thought in mind that we will bring articles of interest and help to the general practitioner, I request the editors of state and local bar association publications who wish to receive material from us to communicate with me at the Headquarters Office, 1140 North Dearborn Street, Chicago 10, Illinois.

The last day of the Annual Meeting in Washington, I had the pleasure of meeting Major General Phillip B. Fleming, Under Secretary of Commerce for Transportation, and Commissioner Thomas H. MacDonald of the Bureau of Public Roads, and many other officials of the President's Highway Safety Conference. This was a splendid opportunity to become acquainted with the representatives of safety organizations. They expressed their appreciation for the services rendered by the American Bar Association in connection with the traffic court improvement program.

While in California in September I had the pleasure of presenting a plaque to the City of Los Angeles for winning first place among cities over one million in population, and a second place award in nearby Pasadena, from among cities of its population group, for outstanding progress in improving traffic court practices and procedures during the past year. The importance of traffic court improvement is emphasized when we realize that 12,000,000 of our citizens appeared in traffic courts last year. These are the only courts with which most of our citizens have any contact.

At the request of Senator Estes Kefauver, the Association has authorized the appointment of a Commission To Investigate Organized Crime. The Commission is composed of the following members: Robert P. Patterson, Chairman, of New York; Howard L. Barkdull, of Ohio; Walter P. Armstrong, Jr., of Tennessee; Arthur J. Freund, of Missouri; Laurance M. Hyde, of Missouri; Philip S. Habermann, of Wisconsin, and Bolitha J. Laws, of the District of Columbia. James V. Bennett of the District of Columbia, has been named as advisory member of the Commission. Our Association welcomes this opportunity to render another public service.

The House of Delegates also has authorized the appointment of a committee to study Communist tactics and objectives. This committee will begin its studies in the near future.

Appointments to the Standing and Special Committees of the Association will soon be announced. Last year, in accordance with the new By-Law, for the first time appointments to the Standing Committees were made on a one, two and three year basis. This provision insures continuity of the work of the committees. Continuity in the work of the Special Committees is also necessary. I trust that members will appreciate the fact that changes in the membership of committees enable us to avail ourselves of only a few

(Continued on page 942)

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *The Seamless Web*

"Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web." These were the first words that Maitland's pen formed as he sat down to write the second edition of Pollock and Maitland's famous *History of English Law*. The law is part of the seamless web of history. The law is, as Holmes said, "a princess mightier than she who once wrought at Bayeux, eternally weaving into her web dim figures of the ever-lengthening past". To each lawyer comes the opportunity to weave a strand—his life—into this never-ending seamless web.

The law is but a part, though a vital part, of the greater tapestry of life itself. Fully aware of the professional status his specialized legal knowledge gives him, the wise lawyer realizes that such status not only accords great privileges, but also imposes commensurate responsibilities. Even more important than his displaying the attributes of a gentleman of the Bar, is that the lawyer show the attributes, first, of a real man.

One of the subtle effects of legal education is often to create a harmful attitude of intellectual snobbishness. This probably results from a false sense of the lawyer's presumed intellectual superiority. The wise lawyer will studiously avoid the self-flattering propensity of many formally educated people to underestimate the intelligence or other important personal qualities of "lesser breeds without the law". An accumulation of facts is one form of knowledge, but its consequence is not necessarily an educated man. Attendance at élite schools does not inevitably produce an educated mind, or a great lawyer, or a leader men will follow. Books are essential to education, but books only represent one kind of experience. They all come to us out of a past, remote to a greater or lesser degree. The legal mind is not necessarily a superior mind for all life's tasks. There is no one in the world so little, that even the greatest may not, at some time, stand in need of his assistance, as the fable of the lion and the mouse has taught since Aesop's day. So the educated lawyer will not let his professional training or status impair his kindly, human understanding of those "little" people whom it is his professional obligation to serve.

The wise weaver of the law's web knows that formal education, despite its obvious merits, has its own shortcomings. One of its faults is to create an ultra-judicial attitude, making men indecisive. Its pupils often enjoy wallowing in safe security and in elevated economic or social position rather than the more dangerous combat of ambitious accomplishment. Often, more tragically, formal education dulls the edge of a man's faith in himself and thus saps his manly courage. What is a lawyer without courage!

The self-educated man may be deficient in the broad view of the law. But experience has taught him the falsity of the fetish that he knows nothing unless he has "had a course in it". He has learned the value of accurate factual knowledge. He has proved, the hard way, the truth that all education is, in the last analysis, self-education. He is tempted by the pitfalls of self-education to regard the law as a ragbag of bits and pieces, until he catches the drift of its ceaseless current. He becomes used to constant change as necessary in an expanding world. He knows that there is truth in the oriental adage, "This, too, shall pass". He has learned to decide for himself. Finally, he has developed the courage to rely on the only man in the world he can really rely on—himself. Aware of the values which inhere in self-education, the wise lawyer resolves to educate himself all his life, and to lessen rather than increase class consciousness.

The maturing lawyer cultivates himself all his days. He maintains a genuine interest in all aspects of life and the various facets of the intellectual world. For him the law is part of a vast treasure house where are stored the precious gems of the human mind. How much of that treasure he will acquire depends, finally, upon himself alone. He knows that a diploma and a degree are not passports to professional success. He comes at last to realize that judgment and humility are the beginning of wisdom. He learns that to understand men in all walks of life is wisdom.

The weaver in the law knows that he cannot follow every strand of its warp and woof all at once. Nor can he always foresee the design which will be woven into the tapestry tomorrow. But he can find unending joy in

weaving his own life into the law's seamless web, and thus play his part in man's ceaseless quest for justice. And this is success!—for "to travel hopefully is a better thing than to arrive, and the true success is to labour".

Editorials

From Members of Our ADVISORY BOARD

■ *Judicial Administration*

What is it we are trying to improve? Only the mechanics of the courts, the speed of the calendar, the number of decisions, easier and better machinery of justice, the administrative side of the courts and judicial process? We have reams of facts and statistics on the subject, the improvement is evident and striking, particularly in the federal courts. Underneath, however, in the minds of the profession, is a growing suspicion, a gnawing feeling of uneasiness, that in the great field of statutory and administrative law the top man whose mind determines the issue has been chosen not only because of his quality as judicial timber but because of his regularity of thought. Not necessarily because of political connections or party efforts but because a probing of his mind before appointment indicates a distinct line or cleavage of thought.

Political lines in this country are close party races, a small per cent of the vote determines the election, a change of several hundred thousand votes in close areas determines the party in power. That party in power is again divided seriously and definitely. On signal issues vetoes of the appointing power have been overridden by large votes. The master minds of the appointing power have been New Deal—now Fair Deal.

One outstanding example in which those tests were not applied is the case of Judge Harold Medina. On the recommendation of the political powers of New York, a party follower in Congress was nominated to fill a vacancy in New York. There were no judicial qualifications of the appointee. The New York State Bar Association, the Bar Association of the City of New York, the American Bar Association registered emphatic objections. The Judiciary Committee of the Senate was then controlled by the Republicans. When the quality of the appointment was revealed, it was apparent that confirmation was not possible and the appointment was

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Each month a member of the *Journal*'s Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

withdrawn. Harold Medina, a Democrat, was recommended for appointment by the bar associations with no questions asked as to a conservative, new deal or fair deal state of mind. The result is history.

Many excellent appointments to judicial office have been made. The confirming powers have screened the appointments carefully, except as to the state of mind of the selections. Can we have a nonpartisan federal judiciary only if the appointing and confirming powers act as checks on each other?

Recently Senator Wiley directed attention to the problem. In this issue is found the forceful address of President Gallagher given at the dinner of the Section of Judicial Administration.

A nonpartisan judiciary is one of the cardinal principles of the great program for improvement of judicial administration of the American Bar Association. It is in process of achievement in a number of states. Is there any possibility of achieving it in the federal judicial system? That is the issue. At stake is the question of the method of judicial selection, appointment or election. If the test of appointment for life is the slant of mind and not the quality of mind, is the appointive method the preferable route?

CARL B. RIX

Milwaukee, Wisconsin

■ *American Ideals: Lost or Preserved?*

Now that we are mobilizing our military forces for the protection of our way of life, it is especially desirable that we keep clearly in mind what it is that we are trying to preserve.

Our own nation was established by a revolution. The revolution was based upon an idea. It is true that it was accomplished by heroic fighting. But the foundation of it was an idea to which our forefathers pledged their lives, their fortunes and their sacred honor.

That idea was that man has inherent inalienable rights that he gets from his Creator, and that the very purpose of government is the protection of those rights.

That idea is today the subject of a controversy. The controversy is not only between ourselves and those against whom we are arming, but it is also an internal controversy that splits our intellectual leaders into two hostile camps.

There is a widespread denial of the existence of natural rights among our political and legal philosophers. The influence of these philosophers is felt through their leadership in education and through their participation in government, especially in the administrative field.

The evidence of this influence among the people at large is abundant and ominous. A very common expression now heard is that the Preamble of the Declaration of Independence is an out-moded myth with no objective validity and that it was a mere shibboleth for inspiration of the revolutionary effort.

In the face of a military peril, various emergency measures are now being taken throughout the country to restore the concepts of personal integrity and natural rights. The Crusade for Freedom is circularizing a Freedom Scroll that reiterates our traditional doctrine and that people are being asked to sign as a testimony of their adherence to these fundamental truths. This is good, but it is not enough. Our thinking will not be secure unless this basic principle of liberty and justice characterizes the minds of those who occupy positions of national leadership, both in the academic and practical fields.

Of all the people who should be interested in this issue, lawyers should be in the forefront, because unless the foundations of the law are preserved in their integrity the outlook for liberty and justice is dim.

In these days of surveys it would be interesting to know how legal education is bearing up under the test. If in our law schools or in the education which precedes professional training, these principles are not inculcated, the default would be serious and the consequences grave. This is not to suggest any outside scrutiny into the academic mind or any censorship of conviction. What is suggested is rather a self-scrutinization by teachers, prelegal and legal. What do *they* think of the Preamble of the Declaration? Is it shibboleth or charter, myth or eternal truth?

In the struggle for maintenance of our ideals, lawyers must not be outdone by others. This obligation lies upon all lawyers, upon practitioners and judges, as well as upon teachers. In a very important sense, however, the obligation is most acute where the legal mind is being formed, and that is in education. In place of oaths imposed by others, the legal educator may well ask himself, in the forum of his own conscience, how his convictions stand on this, the fundamental issue in the present crisis.

HAROLD R. MCKINNON

San Francisco, California

Review of Recent Supreme Court Decisions

PATENTS

Doctrine of Equivalents Reaffirmed and Applied to Claims for a Welding Composition

■ *Graver Tank & Mfg. Company, Inc.* v. *Linde Air Products Company*, 339 U. S. 605, 94 L. ed. Adv. Ops. 767, 70 S. Ct. 854, 18 U. S. Law Week 4339. (No. 2, decided May 29, 1950).

The Linde Air Products Company brought an action for infringement against Lincoln and the two Graver companies for infringement of the Jones patent for an electric welding process and for welding fluxes for use in the process. The trial court held four flux claims valid and infringed, and other claims invalid. The Court of Appeals affirmed the findings of validity but reversed the findings of invalidity, and the Supreme Court reversed the judgment of the Court of Appeals insofar as it reversed that of the trial court, 336 U. S. 271. Rehearing was granted, limited to the question of infringement of the four valid flux claims and to the applicability of the doctrine of equivalents.

The patent claims under consideration were for a welding flux comprising essentially a combination of alkaline earth metal silicate and calcium fluoride, the plaintiff's flux made under the patent containing, however, the silicates of two alkaline earth metals, calcium and magnesium. The accused composition was similar to plaintiff's except for the substitution of manganese silicate for magnesium silicate. The question thus presented was whether the substitution of the manganese which is not an alkaline earth metal for the magnesium which is, was a change of such substance as to avoid infringement.

Mr. Justice JACKSON wrote the opinion of the Court, adhering to the prior decision and holding the four flux claims to be infringed, and thus reaffirming the doctrine of equivalents, saying that "to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system."

Mr. Justice BLACK wrote a dissenting opinion in which Mr. Justice DOUGLAS concurred. Mr. Justice DOUGLAS also wrote a separate dissenting opinion.

Mr. Justice MINTON took no part in the consideration or decision of the case. W.

The case was argued by Thomas V. Koykka for Graver Tank & Mfg. Company and by John F. Cahill and Richard R. Wolfe for The Linde Air Products Company.

PATENTS

Provision in a Patent License Requiring Royalty Payments of a Percentage of Sales of Licensees' Products Whether Patented or Unpatented Does Not Constitute Misuse of Patents—Defendant-Licensee in a Suit for Royalties May Not Contest Validity of the Patents

■ *Automatic Radio Manufacturing Company, Inc.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 94 L. ed. Adv. Ops. 854, 70 S. Ct. 894, 18 U. S. Law Week 4349. (No. 455, decided June 5, 1950).

Hazeltine Research, Inc., assignee of the licensor's interest in a patent license agreement covering a large group of patents and applications sued the licensee Automatic Radio Manufacturing Company, Inc., to recover royalties. The defendant urged that the license agreement was unenforceable because it is a misuse of patents to require the licensee to pay royalties based on its sales, even though none of the patents is used; because the agreement contained a provision requiring a restrictive notice to be attached to the licensed apparatus; and because of invalidity of the licensed patents. The trial court granted the plaintiff's motion for a summary judgment sustaining the validity of the license agreement, ordering an accounting of the royalties due, and for other relief. The Court of Appeals affirmed and the Supreme Court granted certiorari "in order to consider important questions concerning patent misuse and estoppel to challenge the validity of licensed patents".

Mr. Justice MINTON delivered the opinion of the Court, affirming the judgment of the Court of Appeals. The Court found that no misuse of patents was inherent in the royalty provision under consideration and that the petitioner "cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using

Reviews in this issue by Mark H. Johnson and Harold F. Watson.

existing patents plus any developments resulting from respondent's continuous research. We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales."

The Court found that the licensor had made no effort to enforce the provision requiring a restrictive notice on the licensed apparatus and that any issue with respect to this provision of the agreement was moot.

As regards a licensee's estoppel to attack validity of the patents it was held that the general rule that a licensee may not challenge the validity of the licensed patents in a suit for royalties due under the license contract was applicable in the present case, there being no proof that the license agreement in controversy or the practices under it were a misuse of patents or contrary to public policy.

Mr. Justice JACKSON took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice Black concurred.

W.

The case was argued by Floyd H. Crews for Automatic Radio Manufacturing Company, Inc., and by Laurence B. Dodds and Philip S. Lafollette for Hazeltine Research, Inc.

TAXATION

Interest Included in a Deficiency Assessment of Federal Income Tax Remains Due Despite a Subsequent Carry-Back Which Abates the Deficiency

■ *Manning* v. *Seeley Tube & Box Co.*, 338 U. S. 561, 94 L. ed. Adv. Ops. 314, 70 S. Ct. 386, 18 U. S. Law Week 4149. (No. 70, decided February 6, 1950.)

The taxpayer filed its corporate tax return for the taxable year ending in 1941, and timely paid the tax shown to be due. The taxpayer was thereafter adjudged a bankrupt, and the Commissioner assessed a deficiency, including interest, for that taxable year. Prior to payment of the deficiency, the taxpayer filed a return for the year ending in 1943, showing a net operating loss which resulted in the abatement of the entire 1941 tax. The Commissioner withheld from the refund an amount equal to the interest which had been assessed on the deficiency.

The Supreme Court held, in an opinion by the Chief Justice, that the interest on the 1941 deficiency was owing by the taxpayer, despite the fact that the deficiency itself was wiped out by the carry-back. The Government was entitled to the 1941 tax from the time that it was due until the time that the 1943 carry-back created the right to a refund. The failure to exact interest from the taxpayer during this period "would be to place a premium on failure to conform diligently with the law". The opinion acknowledges the argument that no interest is due where the taxpayer causes a postponement of the assessment by filing a petition to the Tax Court, and where the carry-back accrues before the Tax Court decision; but, expressly refusing to pass upon that contention, the Court held that it does not affect the result where the deficiency and interest have been duly assessed prior to the abatement by the carry-back.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

J.

The case was argued by Solicitor General Philip B. Perlman for the United States, and by Walter J. Bilder and George G. Tyler for respondent.

TAXATION

Income Tax Deduction of Trust for Charitable Contribution from Capital Gain Is Limited to Percentage of Gain Taken into Account in Computing Taxable Income

■ *United States* v. *Benedict*, 338 U. S. 692, 94 L. ed. Adv. Ops. 375, 70 S. Ct. 472, 18 U. S. Law Week 4135. (No. 45, decided February 13, 1950.)

Under I.R.C. §162 a trust may deduct in the computation of its taxable net income "any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside" for religious, charitable, etc., purposes. The taxpayer trust in this case was required to pay 45 per cent of its net income to a specified charity. During the taxable year it had, in addition to ordinary income, long-term capital gain of which 50 per cent was taken into account in the computation of the trust's taxable income. The issue in the case was whether the charitable deduction should be the full amount of the trust's net income attributable to the capital gain or should be limited to 50 per cent the percentage of the capital gain taken into account in computing taxable income.

An opinion by Mr. Justice BURTON holds that the 50 per cent limitation applies to the computation of the charitable deduction, because otherwise the undistributed capital gains would be taxed to the trust at less than the 50 per cent statutory percentage.

A dissenting opinion by Mr. Justice FRANKFURTER argues that the rule enunciated by the Court makes tax liability depend upon the "astuteness shown in drawing the trust instrument", because the tax saving rejected in this case may be achieved by requiring the charitable distribution to be made from the ordinary income of the trust.

Mr. Justice BLACK and Mr. Justice JACKSON noted their dissents.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

J.

The case was argued by Arnold Raum for the United States, and by Theodore Pearson for the taxpayer.

TAXATION

Community Subsidies Are Includable in Taxpayer's Basis for Income Tax Depreciation and in Excess Profits Tax Invested Capital

■ *Brown Shoe Company* v. *Commissioner of Internal Revenue*, 339 U. S. 583, 94 L. ed. Adv. Ops. 746, 70 S. Ct. 820, 18 U. S. Law Week 4329. (No. 445, decided May 15, 1950.)

The taxpayer was a manufacturing corporation which received contributions from various community groups to induce the operation of factories in their communities. In

some cases the contributions consisted of buildings; in others, they were cash required to be used for construction of buildings. The major issue in the case was whether these buildings had a basis to the taxpayer for the purpose of depreciation deductions. A corollary question was whether the contributions were includable in invested capital for the purpose of excess profits tax.

The Court held, in an opinion by Mr. Justice CLARK, that the property contributed by nonstockholders was a "contribution to capital" under I. R. C. §113 (a) (8) (B) noting that the contributors did not anticipate any "direct service or recompense". The opinion distinguishes the case of contributions by public utility consumers for the erection of special facilities. In the present case, therefore, the basis for depreciation to the taxpayer includes the amount of contributed cash plus the basis to the contributors of the contributed property. Moreover, since the relevant excess profits tax statute is governed by the same tests, those amounts are includable in invested capital.

Mr. Justice BLACK dissented.

J.

The case was argued by Charles B. McInnis for the taxpayer, and by Harry Marselli for the Commissioner.

TAXATION

Income Tax Deduction for Immediate Amortization of Premium Paid for Callable and Convertible Bond Is Allowable Although Premium Is Attributable to the Conversion Right

■ *Commissioner of Internal Revenue* v. *Korell*, 339 U. S. 619, 94 L. ed. Adv. Ops. 862, 70 S. Ct. 905, 18 U. S. Law Week 4409. (No. 384, decided June 5, 1950.)

The taxpayer purchased bonds each having a face value of $100, callable at $104, and convertible into common stock worth $163 by payment of $40. The taxpayer paid $121 for each bond, and deducted $17 (the difference between purchase price and call price) as amortizable bond premium in the year of the purchase.

The CHIEF JUSTICE delivered the opinion of the Court sustaining the deduction. The opinion considers the argument that the premium in question was clearly paid for the conversion privilege rather than for excessive interest, and that therefore the statute permitting bond premium amortization as an offset against interest income was inapplicable. Nevertheless, in view of the statutory language and of the legislative history, the Court holds that "bond premium" is sufficiently broad to cover the item in question. It is irrelevant "that the public revenues would be maximized by adopting another statutory path . . . . If in practice these sections are causing such loss of revenue as to indicate that Congress may have erred in its balancing of the competing considerations involved, the amendment must obviously be enacted by the Congress and not the Commissioner of Internal Revenue or this Court".

It may be noted that this invitation to legislative amendment has been accepted by Congress in the Revenue Act of 1950.

Mr. Justice BLACK dissented.

Mr. Justice DOUGLAS and Mr. Justice JACKSON took no part in the consideration or decision of the case.

J.

The case was argued by Arnold Raum for the Commissioner, and by Paul L. Peyton for the taxpayer.

Over Five Hundred Lawyers Admitted to Bar of Supreme Court

■ A reader has called our attention to an error in the October issue of the JOURNAL. On page 819, in the account of the highlights of the Association's Annual Meeting in September, we said that "Some three hundred members of the American Bar Association took advantage of their presence in Washington to become members of the Bar of the Supreme Court". In fact, there were 531 members of the Association who were admitted to practice before the nation's highest tribunal. The Court convened in special session during the Annual Meeting as a favor to the Association. This is the largest number of lawyers ever admitted to the Court's Bar in a single day.

These new members each paid an admission fee of $25, which meant that more than $12,500 was paid in to the Court at that time. A substantial part of this money is used to pay the legal costs of persons who could not otherwise afford to bring their cases before the Court.

Courts, Departments and Agencies

E. J. Dimock • EDITOR-IN-CHARGE Lydia A. G. Stratton • ASSISTANT

Army and Navy . . . military tribunals . . . wife accompanying member of Armed Forces outside of U. S. territorial limits may be made amenable to local law . . . she may be tried by military tribunal since, under Articles of War, courts martial do not have exclusive jurisdiction over such persons.

■ *Madsen* v. *Kinsella*, U. S. D. C., S. D. W. Va., September 8, 1950, Moore, D. J.

Mrs. Madsen, an American citizen who had been convicted by a "United States Court of the Allied High Commission for Germany" under German criminal law of slaying her soldier husband while residing with him in U. S. occupied Germany, sought release on a petition of habeas corpus alleging, *inter alia*, that (1) if the court had jurisdiction of her person, it had no jurisdiction to try her for a violation of German law and (2) the Court did not have jurisdiction of her person as she was of a class who are subject to the exclusive jurisdiction of courts martial. The Court held that, upon the dissolution of local sovereignty, it is the power and duty of the conquering nation to provide a substitute government, one of the essential functions of which is the enactment or adoption and administration of a body of criminal laws. "Historically and according to the law of war this is accomplished through decrees of the military commander-in-chief . . .". Judge Moore did not agree that the U. S. proclamation which made German law applicable throughout the U. S. Zone of Germany could not, because it was addressed to the German people, be applied to American citizens. Stating that the purpose of the proclamation was clearly to give German law a territorial application, he said: "If American citizens in occupied Germany (not under military law) were not subject to German criminal laws, what law or system of laws would control their actions? . . . [I]f the criminal laws of Germany were not made applicable to non-military American citizens residing in that occupied country, as well as to the German people, we should behold the absurd spectacle of a class of persons licensed to commit all manner of crimes with impunity, because no criminal laws exist to which they are answerable." As to Mrs. Madsen's second contention, the Court found that, in 1916, the jurisdiction of courts martial had been extended to persons "accompanying" the Army and that at the same time it was provided that the extension should not be construed to deprive military tribunals of concurrent jurisdiction. Although no case involving the trial of a soldier's wife by a military tribunal was brought to the Court's attention, Judge Moore was of the opinion that, prior to 1916, they were triable by such tribunals so that, if a soldier's wife was to be considered a person "accompanying" the Army within the terms of the 1916 amendments to the Articles of War so as to have been brought within the jurisdiction of courts martial, those amendments had effectively reserved the jurisdiction of military tribunals. The petition was denied.

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

Bankruptcy . . . court's power to compel surrender of security . . . where necessary to maintain debtor's solvency, Chapter X reorganization court may order surrender of debtor's pledged property in summary proceeding.

■ *In re Waltham Watch Co.*, U. S. D. C., Mass., August 15, 1950, Sweeney, C. J. (Digested in 19 U. S. Law Week 2098, August 12, 1950).

The Court had ordered the RFC to deliver to the trustees all the company's property in RFC's possession. A deadline of 4:00 P.M., August 8, 1950, was set. At ten minutes of four on that date, the local branch of the RFC received a telegram from the Secretary to the Board of Directors of RFC in Washington withdrawing all authority from anyone in the district to draw on the funds involved. On the same date, the local branch of RFC tendered all property, other than the collateral cash. This, on the Court's order, the trustees refused to accept. Contempt proceedings were brought against the RFC for defiance of the order. It maintained that a court in bankruptcy had summary jurisdiction only over the property of the debtor within his actual or constructive possession at the time the petition in bankruptcy was filed and that right to property not in the debtor's possession on this date must be adjudicated in a plenary proceeding. The Court ruled that the power of the reorganization court to restrain a creditor of the debtor from disposing of property pledged to him and placed in his possession prior to the filing of the reorganization petition was founded on the duty of the court to preserve the debtor's estate and that this duty also empowered the court to authorize such use of pledged property as would not alone enhance its value, and therefore the creditor's security, but was also necessary to the maintenance of the debtor's solvency. The Court levied a compensatory fine of $50,000 against the RFC.

Corporations . . . stockholders' derivative actions . . . in determining whether consideration for compromise is sufficient, court may take into account portion furnished before court approval where circumstances required prompt action.

■ *Pergament et al.* v. *Frazer et al.*, U. S. D. C., E. D. Mich., S. D., Picard, D. J., August 11, 1950. (Digested in 19 U. S. Law Week 2109, September 19, 1950.)

The Court had before it an application under Federal Rule of Civil Procedure 23 (c) for approval of a proposed settlement of a stockholders' derivative action. Part of the consideration for the release of plaintiffs' claims was the guaranty by interests identified with defendants of the repayment of a loan made to the corporation by the Reconstruction Finance Corporation. This guaranty was given after the settlement agreement under consideration had been reached and on the very day that the application for approval was made to the Court at a time before the notices of the application went out to the stockholders. Stockholders who objected to the approval urged that the guaranty had become a *fait accompli* at the time of the Court's consideration of the settlement and that it could not be accepted as consideration of an agreement "in future". The objection was held to be without substance, the Court saying:

"Here objecting stockholders forget recent history. They evidently do not remember that when it was announced that RFC was going to loan Kaiser-Frazer $44,400,000 a number of articles appeared in the public press indicating that a Congressional investigation to stop issuing of the loan was contemplated. This would have delayed matters. Plaintiffs refuse to appreciate that this company was fighting for its life, and we anticipate that if the Kaiser interests had waited even until this day before giving these guaranties and before taking the risk that this court would not approve the settlement agreement some of these very stockholders would be suing the Kaisers on the theory that it was their duty to do the very thing which they now criticize them for doing. . . . [W]e do not understand that the purpose of Rule 23 (c) is properly construed by objecting stockholders as applying only to agreements that are entirely executory. As a matter of fact, we believe that those who were responsible for this rule had no such limitation in mind. But whether they did or did not, this court is not going to lay down the rule that directors of corporations who may in the future be charged with breach of trust or fraud and who may be confronted with a situation that requires immediate action must not under any circumstances do what they honestly believe to be the proper thing until the court has had an opportunity to determine whether the agreement of compromise they may have entered into is good or bad."

Department of Commerce . . . National Production Authority announces regulations governing inventory control.

■ Code of Federal Regulations, Tit. 32A, Ch. I, Pt. 10, §§10.1—10.16 (15 Fed. Reg. 6253).

The purpose of these regulations, published in the *Federal Register* of September 19, 1950, is to prevent the accumulation of excessive inventories of materials in short supply. They do this by limiting the quantities of such materials that can be ordered, received or delivered. The regulations do not apply to ultimate consumers buying for personal or household use but do apply to everyone else buying or selling either for use or for resale including resale in export trade. Criminal liability is imposed for their wilful violation and for the giving of false information or the concealment of any material fact in the course of operation thereunder.

They apply to the following enumerated materials: portland cement, gypsum board, sheathing and lath, ethyl alcohol, benzene, caustic soda, chlorine, glycerine, soda ash, lumber, softwood plywood, wood pulp, iron, steel, forgings, iron and steel scraps, aluminum, columbium, cobalt, copper, magnesium, manganese, nickel, tin, tungsten, zinc, nonferrous scrap, rubber, burlap, cotton pulp, high tenacity rayon yarn, nylon staple and nylon filament yarn.

Labor Law . . . interstate commerce . . . secondary boycott . . . labor practices held to affect interstate commerce where subcontractor annually purchases 65 per cent of materials outside state and it is assumed that like percentage was used on particular job although there was break in route of material and interstate commerce did not extend to location where practices occurred . . . picketing and strike against contractor because subcontractor used nonunion labor on particular job is of primary character and not prohibited by Labor Act.

■ *Denver Building and Construction Trades Council et al.* v. *NLRB*, —F. (2d) —, C. A., D. C., September 1, 1950, Fahy, C. J.

The Denver Building and Construction Trades Council (hereinafter called the Council) and others filed a petition for review and the NLRB filed a petition for enforcement of the latter's order requiring the Council to cease and desist from engaging in, or inducing or encouraging the employees of Doose & Lintner Construction Co. (hereinafter called the contractor) to engage in, a strike with the object of forcing the contractor "to cease doing business with" Gould & Preisner, an electrical concern (hereinafter called the subcontractor). The subcontractor had agreed to furnish certain electrical work and supplies in connection with the construction by the contractor of a commercial building on Bannock Street in Denver. The subcontractor's employees were nonunion whereas all others employed on the job were members of unions affiliated with the Council. The job was picketed as "unfair" for approximately two weeks, during which time no union members worked on the project. Upon the termination of the subcontractor's services (which occurred prior to the completion of its subcontract), all union labor was employed, the picketing ceased, and

the job was completed. The NLRB found that the Council had engaged in an unfair labor practice violative of §8 (b) (4) (A) of the Labor Management Relations Act of 1947, 29 U.S.C. §158 (b) (4) (A) (Supp. 1950), which forbids strikes where the object is forcing or requiring an employer "to cease doing business with any other person". The first question before the Court was whether the Board had jurisdiction over the matter, *i.e.* whether the labor practice was one affecting interstate or foreign commerce. There was no evidence or definite finding of any interstate or foreign commerce at the Bannock Street location. The only interstate commerce involved even indirectly was the annual purchase by the subcontractor of approximately $56,000 of goods which move to its place of business in Denver from out of the state. As to the Bannock Street building itself, the Board found that $348.55 of the subcontractor's materials were used there prior to termination of its services. There was no evidence that any of the material actually came from without the state, but it was assumed by the Board that, since 65 per cent of all the purchases of the subcontractor were so derived, a like percentage of the materials used on the Bannock Street job had a like derivation. Thus the interstate commerce relied upon as a basis for jurisdiction ended at the warehouse and office of the subcontractor and did not extend to the location where the unfair labor practices occurred. The Court did not disturb the Board's ruling that it had jurisdiction though it stated that the decision was a close one and that none of the cases decided by the Supreme Court under the Labor Act presented a similar jurisdictional situation. Noting that, at the same time and in connection with another job in Denver, the subcontractor had been involved in another labor controversy, the Court stated: "Such stoppages in the work of this concern would in a practical and economic sense adversely affect its total business, including its out-of-state purchases. While the actual goods involved at the two sites are not satisfactorily shown to have derived from interstate commerce, the threatened or actual stoppage of work on these and similar projects reasonably should be held to affect significantly the total business of the concern, a substantial part of which is interstate." On a petition for an injunction, a federal district court had previously ruled that the controversy did not affect commerce within the meaning of the Act. The Council contended that this ruling, through the doctrine of *res judicata*, barred the assertion of jurisdiction by the Board. Pointing out that two remedies are provided in the statute for the purpose of accomplishing two separate though related purposes, one in the District Court of a preliminary character and the other before the Board and reviewing courts of a final character, the Court refused to apply the doctrine of *res judicata* where to do so would be inconsistent with the plan of Congress for the administration and enforcement of its policy even though the elements which usually make out a case for its application were present.

The final question presented was whether the labor practices fell within the prohibitions of the Act. The Council contended and the Court agreed that the provisions of the Act here involved were directed against secondary boycotts and secondary strikes. Holding that the present action was of primary character, the Court spoke as follows: "The usual secondary boycott or strike is against one who is not a party to the original dispute. It is designed to cause a neutral to cease doing business with, or to bring pressure upon, the one with whom labor has the dispute. . . . The situation before us is not of this character. The picketing and resulting strike were at the premises of the contractor where the subcontractor's men were at work. It grew out of a controversy over the conduct of the contractor in participating in the bringing of the nonunion men onto the job as well as over the conduct of the electrical subcontractor in employing them. The purpose of the Council was to render the particular job all union. It was not to require [the subcontractor] to unionize their shop located elsewhere or to bring pressure against [the contractor] at any other place because of the employment of [the subcontractor] at Bannock Street. Accordingly the object was not in any literal sense to require [the contractor] to cease doing business with [the subcontractor]. The pressure was limited to the one job, which was picketed as a whole to make it wholly union and in protest against the employment there of the nonunion electricians. . . . Clearer language than that of §8 (b) (4) (A) would be needed to take the conduct outside the provisions of §13 that nothing in the Act shall be construed to interfere with the right to strike 'except as specially provided for herein'. . . . We think in fact the picketing must be considered as against both [the contractor] and [the subcontractor] — inseparably; and that its object was to bring the job to a standstill until the nonunion electricians were replaced. The job was said to be 'unfair'. The contractor cannot separate itself from the conditions there so as to make the action by the Council against it secondary; nor can the subcontractor." The Court refused to enforce the order of the Board and ordered it set aside.

Clark, C. J., dissented from the decision on the questions of jurisdiction and *res judicata* but concurred in the finding that, within the meaning of the Act, there was no unfair labor practice and in the result.

Monopolies . . . Sherman Antitrust Act . . . refusal of newspaper having local monopoly to carry advertising if advertiser uses local radio station, which is heard in neighboring state and has programs originating outside state, is restraint of interstate commerce . . . injunction against such action does not constitute denial of free press.

■ *U. S.* v. *The Lorain Journal Co. et al.*, U. S. D. C., N. Ohio, E. D.,

August 29, 1950, Freed, D. J.

The United States sought to enjoin The Lorain Journal Company and its officers (hereinafter called "the Journal") from continuing to engage in acts in furtherance of an alleged combination and conspiracy (a) in restraint of the interstate commerce of competitive news and advertising media and of their advertisers in violation of §1 of the Sherman Antitrust Act (15 U. S. C. A. §§1-7) and (b) to monopolize and to attempt to monopolize news and advertising channels in violation of §2 of that Act. Specifically it was charged that the Journal, which was the only daily newspaper of general circulation published in Lorain, Ohio, formulated and put into execution a plan designed and intended to eliminate the competition of radio stations WEOL and WEOL-FM, which operate from studios in Lorain and in Elyria, which is eight miles from Lorain, by the device of refusing to accept advertising from local merchants if a prospective advertiser used the advertising facilities of the radio stations. The Court found the charge clearly established. Seeking to avoid the ban of the Act, the Journal argued, among other contentions, that (1) only a local monopoly and not a monopoly of interstate commerce was sought and (2) under the constitutional guarantee of a free press, the Court was powerless to issue even a prohibitory injunction restraining it from refusing to accept advertising where the basis for such refusal was the advertiser's use of the radio stations, since to do so would involve a "prior restraint" upon its freedom to publish or to refuse to publish whatever it wished. The Court further found that WEOL was licensed to serve an area located wholly within Ohio but its broadcasts could be and were heard in southeastern Michigan, that it was not affiliated with any national network but it broadcast athletic events originating at places outside Ohio, that 65 per cent of its broadcast time was devoted to musical transcriptions leased to it by companies located outside the state, that 10 to 12 per cent of its broadcast time was devoted to news broadcasts consisting of news gathered outside Ohio and provided by United Press teletype, that 16 per cent of its gross income in 1949 was obtained from "national advertisers" seeking to promote good will for their products and that, in a few instances, it had broadcast advertising soliciting orders to be filled by direct shipment from out the state. Citing cases in which local monopolies were held proscribed by the Act, it was pointed out that, in those cases, unlike the present instance, the restraint of interstate commerce was effectuated by restricting the freedom of a local buyer to purchase in the interstate market or the freedom of an interstate seller to sell in the local market. After referring to the fact that WEOL was licensed in response to a public need and interest, that it provided an important medium through which interstate programs could reach the local community, and that it might be completely driven out of existence by the attack upon one of its principal sources of business and income, the Court said that local monopolies were proscribed by the Act where they were achieved or sought by restraint of interstate commerce and it was "pressed to the conclusion that radio broadcasting in general, and radio station WEOL in particular, is entitled to the protection the Act affords". As to the Journal's argument on the free press guarantee, the Court spoke as follows: "[The refusal to deal] is a vice condemned by the Sherman Act and the evil may be restrained without affecting the operations of the Journal as an organ of opinion and without touching upon the legitimate conduct of its business affairs. Prior restraint on the substance of expression is one thing; injunctive relief against the repetition of the commercial abuse proved here is quite another. It would be strange indeed to pervert the liberty proclaimed by the First Amendment into a license for the continuation of a dictatorial course of action designed to suppress another and equally important instrumentality of information and expression. The purpose sought to be served by that Amendment would not survive many such paradoxes."

Post Office Department . . . rules of practice in cases arising under Postal Fraud, Lottery and Fictitious Statutes amended.

■ Code of Federal Regulations, Tit. 39, Ch. I, Pt. 151, Subpt. A, §§151.1 –151.29 (15 Fed. Reg. 6081).

Amended rules of practice applicable to all formal proceedings arising under statutes authorizing the Postmaster General to issue orders directing the return to senders of mail addressed to those operating certain unlawful enterprises through the mails and prohibiting the payment of money orders and postal notes payable to the operators of such enterprises were published in the *Federal Register* of September 9, 1950. The rules cover, among other matters, admission to practice, complaints, answers, compromises, appearances and evidence.

Radio Communication . . . Communications Act of 1934 . . . Congress has fully occupied field of television regulation . . . state censorship of film used in television programs held invalid.

■ *Allen B. Dumont Laboratories, Inc., et al.* v. *Carroll et al.*, C. A. 3d, September 5, 1950, Biggs, C. J. (Digested in 19 U. S. Law Week 2098, September 12, 1950).

In a suit brought under the Federal Declaratory Judgments Act (28 U. S. C. §§2201-2) to determine whether Pennsylvania might censor films used by plaintiffs in projecting television programs in the state, the lower court had granted judgment for plaintiffs. Affirming the decision, the Court of Appeals held that interstate commerce was inherent in the very nature of television broadcasting and that the Communications Act of 1934 (47 U. S. C. §151 *et seq.*) covers the television, as well as the radio, field. It did not agree with the defendants' contention that the field of censorship was left open by the Act

and that therefore the State Board of Censors as an exercise of state police power might censor films used in television broadcasting. The Court said: "It is clear from [the provisions of the Act] that Congress was concerned with the contents of the programs of all broadcasting stations, including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions, for the transgressor who should broadcast an indecent or obscene program. Congress did not intend to control in advance the broadcasting of radio programs but it did intend to prevent the transmittal of obscene matter through the ether. Program control was entrusted to the Federal Commission and it is an effective one. ... We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States."

Trade-Marks . . . interests of public . . . concession for purposes of motion . . . although denying relief to plaintiff in infringement suit, court may require defendant to inform public of defectiveness of its products . . . concession of defectiveness for purposes of motion binding where motion granted.

■ *Stahly, Inc.* v. *M. H. Jacobs Co., Inc.*, 183 F. (2d) 914, C. A. 7th, August 15, 1950, Lindley, C. J. (Digested in 19 U. S. Law Week 2102, September 12, 1950).

In a suit for infringement of a trade-mark, defendant's motion for summary judgment was granted upon the ground that plaintiff had waived its rights to object. Upon appeal, the granting of the motion was affirmed, but the Court modified the decree to require defendants to inform the public that their products are defective. In a petition for rehearing, defendants argued that, whether or not they were engaged in the perpetration of a fraud upon the public, the court should have affirmed the judgment without modification since plaintiff had no standing in court as a protector of the public interest absent a violation of a private right. Denying the petition, the Court stated: "While none of the decisions cited is on all fours with the instant case, it cannot be denied that those relied on by defendants are very near and that the distinction sought to be drawn by plaintiff between them and this case is a rather tenuous one. Even so, we think the trial court in the instant case . . . had the inherent power to frame its decree . . . in such a manner as to protect the public against the continuation of those unlawful acts and practices, and this without regard to violation or nonviolation of any rights of plaintiff. . . . If, on the other hand, as defendants insist, it is the law that the court, because it determined that plaintiff had suffered no legal wrong at the hands of defendants, was powerless to prevent the perpetration of an admitted fraud upon the public, it would seem that the Supreme Court should be accorded an opportunity so to decide." The Court further held that, although defendants' admission that their products were defective was made for the limited purpose of the disposition of their motion for summary judgment, it was nevertheless still binding upon them since their motion had not been overruled.

Further Proceedings in Cases Reported in This Division

■ The following action has been taken by Mr. Justice Jackson of the United States Supreme Court, Circuit Justice for the Second Circuit:

BAIL GRANTED, September 25, 1950: *U. S.* v. *Dennis et al.*, 183 F. (2d) 201 —Crimes (36 A.B.A.J. 856, October, 1950; see also *U.S.* v. *Foster et al.*, 35 A.B.A.J. 422, May, 1949; *U. S.* v. *Gates, U. S.* v. *Hall and Winston*, and *U. S.* v. *Green*, 35 A.B.A.J. 850, 1022, October, December, 1949; *U. S.* v. *Sacher et al.*, 36 A.B.A.J. 491, June, 1950). After affirming the conviction of eleven Communist party leaders for conspiring to advocate and teach the violent overthrow of the United States and to organize the party for that purpose, the Second Circuit Court of Appeals had revoked bail in a two-to-one decision, L. Hand, C. J., dissenting, but had granted a thirty-day extension to permit review by the circuit justice. In an opinion granting release on bail, he stated: "To remain at large, under bond, after conviction and until the courts complete the process of settling substantial questions which underlie the determination of guilt cannot be demanded as a matter of right. It rests in sound judicial discretion. Only in a rare case will I override a clear and direct decision by the Court of Appeals that bail ought to be granted or denied. But here one judge favored its allowance, and the action of his two associates in granting a thirty-day extension implied the continuing power to grant bail, which is dependent on persistence of a substantial question and indicated that they did not regard the defendants as presenting a very immediate public danger." Regarding the case as one in which substantial questions are open to review by the Supreme Court and in which bail would ordinarily be granted, Mr. Justice Jackson was of the opinion that unjustified imprisonment of the defendants would be more harmful to the nation than any action they might take while at large since the Department of Justice was alert to the dangers.

Department of Legislation

Harry W. Jones, Editor-in-Charge

■ The author of this article, John M. Kernochan of the New York Bar, is Assistant to the Director of the Legislative Drafting Research Fund of Columbia University. The occasion for Mr. Kernochan's sketch of the advantages of continuous statutory revision is the recent publication of Florida Statutes 1949, prepared under the direction of Charles Tom Henderson, Assistant Attorney General and Statutory Revisor of the State of Florida. A comprehensive review of Florida Statutes 1949 by Professor George J. Miller of the University of Florida appears in the Summer, 1950, issue of the *University of Florida Law Review*.

Continuous Statutory Revision and Compilation

By John M. Kernochan

■ The recent publication of *Florida Statutes 1949* marks an important event, the actual entry of Florida upon a program of continuous statutory revision and compilation. Thus, one more state is added to the growing number of those adopting a wise and simple, if not exactly brand-new, solution to an old problem. The occasion prompts a brief review.

The "old problem" referred to is the chaotic condition of the statute law in states which undertake no adequately sustained or systematic ordering of their statute books. This condition creates at least two major difficulties for lawyers: first, that of physically locating pertinent legislative provisions and, second, that of accurately ascertaining what the law is from such provisions as can be located. Florida's solution meets these difficulties in a peculiarly effective way, and involves the performance of certain functions which ought to be performed by every government.

Continuous Revision Plan Originated in Wisconsin

Florida's program is based, with a few variations, upon a plan first realized in Wisconsin in 1910 and described in detail in the May, 1924, issue of the JOURNAL (10 A.B.A.J. 305). Under this plan, a Revisor of Statutes was appointed. He was charged with revising the statutes and submitting revision bills to the legislature and with compiling or editing copy, after each biennial session of the legislature, for a volume to be called "Wisconsin Statutes". The principal fruit of the Revisor's labors was and is the publication every two years of a fresh edition of this volume, containing in completely up-to-date form, as of the end of the immediately preceding legislative session, all the general state statutes then in force. The "Wisconsin Statutes" are prepared at a relatively modest cost to the state and sold at a price well within the means of even struggling beginners at the Bar. A practitioner, for all ordinary current statutory questions, need have no more than this volume and its companion, also prepared by the Revisor, "Wisconsin Annotations". Finally, but importantly, the state's 1898 statutory revision, and subsequent revision bills prepared under the plan, have been enacted as law and not merely adopted as *prima facie* evidence of it.

Revision, Compilation, Enactment—Essential, Interrelated Features

The essential functions involved—revision, compilation, and enactment—ought, it was suggested earlier, to be performed by every government. They merit closer scrutiny here.

Revision aims to clarify and correct the existing statute law but does not embrace major changes affecting substance or basic legislative policy. In this it differs from the work of bodies, like the New York Law Revision Commission, principally concerned with such major changes. Revision includes the modification and redrafting necessary to eliminate obscurity, verbosity, conflicts and duplications in the statute law. It seeks further to remove from the statute books provisions that are obsolete for such reasons as changed conditions and total accomplishment of the statutory purpose. Another object is to delete provisions which have become inoperative by, for example, amendment, repeal, or declaration of unconstitutionality. Not the least of these tasks is the reduction, and perhaps prevention, of problems of repeal by implication, a vexatious source of statutory uncertainty.

Wisconsin revision is *topical* rather than *bulk*. Instead of trying to overhaul the whole body of statute law every two years, the Revisor proceeds more slowly, taking up one topic at a time, thus ensuring more careful consideration of revisions by both Revisor and enacting legislature. Of course in states where the statutes have long been untended, or where there is no satisfactory basic organization of the statute law, it may be necessary to undertake a bulk revision initially. Indeed, Wisconsin uses such a revision, that of 1898, as its point of departure. The benefits of the huge and costly bulk job can then be preserved by continuous topical revision.

While revision clarifies what the statute law is, compilation makes it easier to find and includes such work as indexing, organization and editing for publication. Sets of statutes published by private agencies are, in the main, compilations. No practicing lawyer is likely to underestimate the value to him of these seemingly mechanical measures to facilitate law finding. Revision and compilation are, in fact, complementary, the potentialities of neither one being fully realizable without the other.

If a revision is not enacted as law, so as to replace relevant prior enactments, many of its benefits are wasted. The sources of law have been multiplied instead of reduced.

Considering the obvious advantages and need for performance of the functions discussed it is surprising that adoption of the continuous revision idea has not been wider and more rapid. Impressive progress reports in bar journals and law reviews have come from the Revisors of Kansas, Kentucky, Florida and other states that have endeavored to effectuate in some measure the Wisconsin Plan. Although revision raises some resistance from die-hards unwilling to see the abandonment of familiar section numbers, and creates some problems of its own, such as inevitable errors in the revising process and difficulties in connection with the passage of revision bills in states that have local constitutional restrictions on subject matter of bills, referential legislation, and the like, no glaring errors and few insurmountable obstacles have yet been reported. No adopting state has yet abandoned the system. The advantages reported—reduction of statutory bulk; clarification of ambiguities; promulgation of manageable, authoritative, up-to-date, reasonably priced statute books; simplification of drafting and planning of legislation—seem to dwarf the objections. In spite of all this, Robert K. Cullen, Kentucky's Revisor, writing in 1945, listed only some twenty states as having by that time adopted continuous statutory revision. Furthermore, not all these had retained all the commendable features of the Wisconsin Plan. While variation is to be expected owing to legislative, constitutional or other differences, it seems clear that failure to perform any one of the basic functions of that plan is by so much a failure to perform a needed service towards making legislative law accessible and certain.

A word should be said about how a program of continuous statutory revision fits into the general governmental scheme. The work of revisors needs to be differentiated from that of law reform commissions and legislative and judicial councils. The latter agencies are concerned to an appreciable degree with policy and substance. In contrast, it is vital that the Revisor, whose services are technical services like those of persons employed in bill drafting and legislative reference work, keep apart from policy and its political implications. Without that continuity in office which only a strictly nonpolitical status allows, the indispensable benefits of prolonged revisional experience may be lost. Expeditious and intelligent handling of revision bills depends on the legislator's belief that the Revisor, who must maintain close liaison with the legislature, is an impartial expert. Some writers and some states have favored combining the policy and nonpolicy agencies, but this combination seems unwise. Much more desirable is the combination of revision with technical services like bill drafting and legislative reference work. The profit of joining revision and bill drafting is patent. The Revisor is peculiarly qualified to draft bills to fit neatly into the existing body of law. His knowledge facilitates avoidance of the pitfalls of implied repeal. Bill drafting permits him to accomplish the aims of revision in the stages preceding enactment.

Association Calendar

NOVEMBER 9, 1950—Meeting of special committee appointed by the President and the Chairman of the House of Delegates to investigate the desirability of purchasing Salisbury House and to inspect the property, Des Moines, Iowa

NOVEMBER 10 and 11, 1950—Meeting of the Board of Governors, Des Moines, Iowa

FEBRUARY 26-28, 1951—Mid-Year Meeting of the House of Delegates, Edgewater Beach Hotel, Chicago, Illinois

FEBRUARY 27, 1951—Meeting of State Delegates To Nominate Officers and Members of the Board of Governors

APRIL 19, 1951—Deadline for receipt in the Chicago Headquarters of Petitions for Nomination of State Delegates (For publication in the April issue of the JOURNAL, petitions must be received by March 5)

SEPTEMBER 17-21, 1951—74th Annual Meeting of the American Bar Association, New York, New York

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.**

The New Tax Law
Some Provisions Affecting Stockholders

■ The Revenue Law of 1950, approved on September 23, amends the Internal Revenue Code in many important respects. Among the most interesting and far-reaching are those affecting corporate shareholders as such. Four of these amendments are summarized below. This material, together with a more complete summary of the entire Act, is included in the October Bulletin to members of the Section of Taxation.

■ (1) *Collapsible corporations.* This provision, Section 117 (m), is aimed at the so-called Hollywood corporations. These corporations (typically) are organized for a single purpose, *e.g.* to produce a motion picture or to construct a building. After the project is complete, but before the corporation has realized any substantial income, it is liquidated and the shareholders receive the completed property in exchange for their stock. Under Section 115 (c), literally applied, they realize a long-term capital gain measured by the increased value of the property created by the corporation. Their basis for the property is stepped up to current value and they realize no further gain in disposing of the property.

The new statute defines a collapsible corporation in terms which are reminiscent of Section 102 but the tests are far more specific. A collapsible corporation is one which is "formed or availed of" principally for the production of property "with a view to" liquidation (or a sale of the stock or distribution of the property) prior to the realization by the corporation of "a substantial part" of the income to be derived from the property, and the realization of such gain by the shareholders. The statute only applies to a shareholder owning, directly or indirectly (*e.g.* through his family), more than 10 per cent of the stock. It does not apply unless more than 70 per cent of the shareholder's gain is attributable to the property, nor to any gain realized more than three years after completion of the project. If the statute is applicable the gain realized by the shareholder in respect of his stock, in liquidation or otherwise, is taxed as ordinary income.

The statute would not apply if the corporation itself disposed of the property and were taxed on the income or gain.

Section 117 (m) should be carefully checked in connection with corporate liquidations, distributions of property in kind and sales of stock in closely held companies.

(2) *Certain tax-free liquidations.* Congress has reactivated Section 112 (b) (7) and made it applicable to 1951. Its purpose is to permit the liquidation of closely held corporations without the recognition of gain attributable to the appreciation of property values. It will be applied in practice primarily to personal holding companies and corporations holding real estate.

Incorporation is ordinarily a one-way street from the tax point of view. An individual or group of individuals may transfer property to a corporation tax free under Section 112 (b) (5). But if they later wish to get rid of the corporation and take the property back they will realize a taxable gain based upon the appreciated value of the property.

Under Section 112(b) (7), if the holders of 80 per cent of the stock so elect, they may liquidate the company and take back the property without being taxed on this gain. The price which they must pay for this privilege is a tax at ordinary income rates on their respective shares of the corporation's earnings and profits accumulated at the time of liquidation. The tax-free privilege does not extend to money or securities acquired by the corporation after August 15, 1950. A slightly different rule is prescribed for corporate stockholders.

From the practical point of view, this statute will be useful only in respect of corporations which have distributed their earnings currently. If the corporation has a substantial earned surplus, due perhaps to the payment of mortgages and other debts out of earnings, then it will probably be cheaper to liquidate in the usual way under Section 115 (c) and take over both the earnings and the property at capital gain rates. Section 112 (b) (7) will be in effect only during 1951.

Quaere: Can a collapsible corporation be liquidated tax-free under Section 112 (b)(7)?

(3) *Employee stock options.* Another new provision favorable to taxpayers is Section 130A. Under current Bureau regulations and rulings an employee acquiring stock of his employer receives ordinary income (compensation) measured by the spread between the value of the stock and the purchase price,—this, even though his purchase is pursuant to an option and even though there was no spread between market value and option price at the time the option was granted. See *Commissioner* v. *Smith*, 324 U. S. 177 (1945). These regulations, according to the Senate Finance Committee, "impede the use of the employee stock option for incentive purposes".

Section 130A defines a "restricted stock option" in precise terms: It is an option granted to an employee by his employer or by a parent or subsidiary corporation to purchase stock of any of such corporations; the option price must be at least 85 per cent

of fair market value at the time the option is granted; the option by its terms must be nontransferrable except by death; the employee at the time the option is granted must not own, directly or indirectly, more than 10 per cent of the stock of the employer or its parent or subsidiary.

If a restricted stock option is exercised while the purchaser is an employee or within three months after leaving the employ and if the stock so acquired is not disposed of until at least two years after the option is granted and at least six months after its exercise, then the employee realizes no income by exercising the option, regardless of the spread at that time.

When the stock so acquired is ultimately sold the employee will have a long term capital gain equal to the difference between the option price (his cost) and what he sells it for. This rule is qualified by a special provision applicable when the option price is less than 95 per cent of fair market value at the time the option is granted. In such event this spread between the option price and fair value when the option was granted is taxed as ordinary income when the stock is sold, or disposed of by gift, or at the stockholder's death. For example a share worth $100 is optioned to an employee at $85. He buys the stock, holds it for the required period and finally sells it for $150. He receives ordinary income of $15 and a long term capital gain of $50. If the stock goes down in value and he sells for $90 he will have ordinary income of $5, (the lesser spread at the time of sale); if he sells for less than the option price he will have a capital loss.

The statute applies to options granted after February 26, 1945 (when the *Smith* case was decided) which are exercised after 1949. If an outstanding option is modified, extended or renewed this is considered as the granting of a new option and the relationship between the option price and fair value must be redetermined.

This new provision raises serious problems for the practitioner. The option must be carefully drafted to qualify as a restricted stock option. And irrespective of its form it will not qualify if the price is less than 85 per cent of fair market value. If the stock is unlisted and has no easily determinable market price it will be important to develop a convincing record on valuation, by appraisal or otherwise, when the option price is fixed.

(4) *Redemption of stock held by decedents' estates.* Section 115 (g) has been rewritten to permit the tax-free redemption of corporate stock held by a decedent's estate for the purpose of paying estate and other death taxes. This is the statute under which money received in redemption of stock may under certain conditions be taxed as a dividend. It is now made inapplicable to distributions by a corporation in redemption or purchase of its stock included in a decedent's gross estate for estate tax. The distribution must be made within three years plus ninety days after the filing of the estate tax return, and the exemption extends only to so much of the distribution as is not in excess of the death taxes including interest. The exemption only applies if the estate tax valuation of the stock exceeds 50 per cent of the net estate.

This new provision will apply primarily to family corporations, and will enable the estate of a large shareholder to raise money for estate taxes by surrendering a portion of the decedent's stock. Heretofore the risk of a dividend tax under Section 115 (g) has deterred most estates from resorting to this method of financing.

The above thumbnail summaries obviously do not purport to cover all the refinements of these highly technical provisions.

The President's Page

(Continued from page 927)

of the many qualified and able members who are willing to serve.

While the American Bar Association represents through its House of Delegates the great majority of American lawyers, we need to increase the number of lawyers in the Association. A practical way to do this is through personal solicitation by our members. I trust we can increase our membership by a third this coming year. When properly approached, most lawyers are apologetic because they have not previously joined. Would that the slogan of each member were "I will get at least one new member for the American Bar Association". With increased members will come increased strength and financial support for worthwhile programs.

I have recently attended meetings of the Nebraska State Bar Association, the North Carolina Bar Association and the Cincinnati Bar Association. I have found the privilege of attending annual meetings of the state bar associations most inspiring. The programs are well prepared and instructive. The lawyers while enjoying the fellowship and entertainment which the meetings offer are nevertheless serious in carrying on association work. There is every evidence that the American lawyer is awakening to the responsibility and opportunity which joint efforts provide.

OUR YOUNGER LAWYERS

Richard H. Keatinge, Secretary and Editor-in-Charge, Los Angeles, California

Progress Report of Economic Survey

■ The most pressing problem which sooner or later faces every law student is: If and when I graduate, where shall I practice law?

Until recently, the organized Bar had done little to aid in solving this problem. But on January 1, 1950, the Economic Survey Committee was formed as a special committee of the Junior Bar Conference.

The function of the committee is to prepare a report in each state showing the economic conditions of the practice of law in that state. The surveys are to be patterned after the Michigan survey published in 1948 by the Junior Bar Conference Section of the State Bar of Michigan under the direction of Robert H. Hosick and John W. Cummiskey.

When completed, these surveys will show for each county in each state the average fees of attorneys for office consultation, court appearances, drafting of deeds, wills and leases, the handling of divorces, foreclosures and title examinations, as well as the average hourly rate charged.

In addition to this information, the report will show the average monthly expenses, including office rent per room, stenographers' salaries, utilities, books and stationery. The reports will show county by county the average net income before taxes during the first ten years of practice, and the average net income before taxes for those in practice over ten years, the number of lawyers under 35, those between 35 and 60, and those over 60, and the number of lawyers per capita of population.

Thus while each individual law student's case presents a host of special considerations which could not possibly be answered by statistics, at least the student will be able to note at a glance whether or not the legal profession in any particular county is overcrowded, what the average fees may be, what the average expenses may be and what he can expect as an income.

Besides these data, the reports will contain a monograph on each county setting forth the availability or unavailability of office space, the presence or absence of a public law library, the most common fields of legal practice, the major industry of the county and the nature of the business conditions in any particular county.

In view of the fact that the committee is without funds, the results achieved so far have been most hopeful. Already the Junior Bar Section of the Iowa State Bar Association has completed and published the Iowa Survey under the chairmanship of John L. Hyland. The State Bars of Colorado, North Dakota and Pennsylvania have endorsed the survey and provided the funds needed to conduct it. Similar promises of financial help have been received in many other states.

While these reports when completed will be of considerable help to law students in attempting to decide where they should set up practice, their usefulness is not thus limited. The reports will also help to combat the often repeated statement that lawyers' fees are too high. This type of statement has materially aided those who are interested in the unlawful practice of the law.

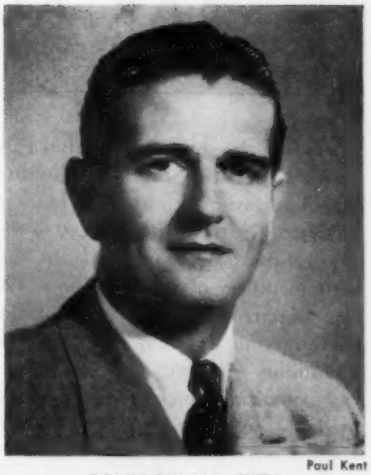
Thus in the March-April, 1949, issue of *Case and Comment* there appears an article by Kenneth Draper, President, Detroit Real Estate Board, entitled "Stick To Your Last", where the author states at page 6:

> The realtor would be more than pleased to have the attorneys concerned draw these papers (i.e., land contracts, mortgages, deeds, leases, etc.) but as a rule things are expedited by having them prepared in his own office. If one of the attorneys offers to draw them—that's fine, but actually isn't it true that lots of moderate income clients would resent the extra charge necessary? We who deal with small home purchasers find that many people of meager means would rather take any legal chance than pay a lawyer over $35.00. They tell us just that. We sometimes have to browbeat customers into taking an abstract to a lawyer for examination, and then they ask if we don't know a $5.00 lawyer. We don't.

Fortunately this type of loose language, which results in fear on the part of the general public of going to a lawyer, is very simple to refute with actual facts.

The author of the "Stick to Your Last" article is a Michigan real estate man. A brief glance at the Michigan Survey prepared by the Junior Bar Section of the Michigan State Bar shows that there are a great number of $5.00 lawyers. As a matter of fact, the average fee schedule for drafting deeds shows that in no county in Michigan, save one, of the eighty-three counties represented is more

(Continued on page 975)



Paul Kent

CAMERON W. CECIL
Chairman, Committee on Economic Survey

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

■ During the summer the Civil Liberties Committee of the Columbus Bar Association conducted an extensive investigation with respect to the alleged use of excessive force by certain members of the Columbus Police Department. The result of the investigation was that the Mayor of Columbus appointed an investigating committee which made use of the evidence obtained by the Association's Civil Liberties Committee.

In the course of the investigation the Association's Committee studied approximately fifty cases. Since the report of the Mayor's Committee has been filed, only three cases of alleged police brutality have been reported and in two of these cases no action was deemed warranted.

The Civil Liberties Committee has also investigated complaints that the Warden of the Ohio State Penitentiary has declined to grant interviews to lawyers representing inmates in *habeas corpus* actions. A satisfactory adjustment of this problem was worked out with the Attorney General's office.

■ A committee of the Wisconsin Bar Association has completed a study of lobbying in the Wisconsin State Legislature, with particular emphasis on lawyers' obligations and duties in connection with lobbying. The conclusions and recommendations of the committee were summarized in the report as follows:

1. Lawyer lobbyists are subject to all of the Canons of Professional Ethics in their lobbying services, as well as the statutory provisions.
2. Lobbying is sanctioned by both statutes and Canons, provided it is open, honest and not against public policy.
3. Because lobbying necessarily involves personal relationships, the application of the Canons of Ethics must be applied to meet the practical aspects of the problem.
4. The committee does not favor requiring all licensed lobbyists to be lawyers, but recommends the development of high standards of conduct applicable to all.
5. Through the Wisconsin Bar Association we urge the organization of a voluntary group of lobbyists, to police its own ranks, and to adopt its own standards and controls.

■ George Maurice Morris was reëlected Speaker of the House of Deputies of the International Bar Association at its third conference in London in July and Amos J. Peaslee of New Jersey was reëlected Secretary General. The presidency of the organization is held by Co-Presidents Sir Godfrey Russell Vick, K. C., Chairman of the General Council of the Bar of England, and Leonard S. Holmes, President of The Law Society. Thomas G. Lund, Secretary of The Law Society, was elected Treasurer.

The Conference lasted for one week and was organized into some fourteen symposia, at which were discussed such subjects as war crimes, narco-analysis, conflicts of law, judicial systems, women's rights, legal education, international copyright protection, immigration laws and codes of professional ethics.

The official hosts of the Conference, the General Council of the Bar of England and The Law Society, arranged an elaborate social program, including a reception at the The Law Society's Hall, a reception by the Lord Chancellor in the Royal Gallery of the House of Lords, a river excursion to the Royal Naval College, a reception at the Inns of Court, and receptions by the Twelve Great Companies and Livery Guild of the City of London. The closing event of the Conference was a banquet at Guildhall.

■ During the month of November regional competitions are being held in law schools throughout the country to select participants for the final argument in the nation-wide moot court competition, sponsored by the Committee on Junior Bar Activities of The Association of the Bar of the City of New York, of which Alfred P. O'Hara is Chairman.

These contests are organized into regions roughly corresponding to the federal circuits, and in each region a local bar association or law school is acting as sponsor for the competition. Among the sponsors are the Boston Bar Association, the Bar Association of the District of Columbia, the Philadelphia Bar Association, The Southwestern Legal Foundation, Younger Members Section of the Illinois State Bar Association, the Columbus Bar Association and the Bar Association of St. Louis.

The case to be argued in all the competitions is entitled *"Fayerweather* v. *Rain Control, Inc."* The record in the case, which will be heard in the "Supreme Court of the State of Jefferson", has been distributed to the schools participating in the twelve regional contests, which will determine the winning teams that will argue in New York in December. The case involves a complaint that the defendant through the use of scientific methods removed moisture from clouds moving over the defendant's lands and that the plaintiff's lands received no rain, with the result that the growth of certain of plaintiff's crops and farm produce required for the feeding of plaintiff's livestock was stunted and retarded; and certain other crops and farm produce withered and blighted, damaging the plaintiff in the sum of $21,000.00.

■ Aware of the need on the part of the public for assistance in the current nation-wide drive against organized crime, the Detroit Bar Association has appointed a Law Enforcement Committee to coöperate with government and police agencies in the Detroit area.

The Committee is made up of former attorneys general, prosecuting attorneys, police commissioners,

prominent trial lawyers and a former Justice of the Supreme Court. The Chairman is John H. Brennan. The new committee will study proposals which have been made for the establishment of a crime commission in Detroit.

■ In August the Iowa Roundtable, sponsored by the Iowa State Bar Association, presented its 400th weekly broadcast over Radio Station WHO and WHO-FM in Des Moines, Iowa. "The Lawyer in Modern Society" was discussed by T. M. Ingersoll, Cedar Rapids, President of the Iowa State Bar Association; William O. Weaver, Wapello, Chairman of the Public Relations Committee of the Iowa State Bar Association; Robert Throckmorton, Des Moines, of the Junior Bar Section of the Iowa State Bar Association, and by Wendell Gibson, Des Moines, founder of the Iowa Roundtable, and Herschel Langdon, Des Moines, Chairman of the Iowa Roundtable since 1941. Hiram S. Hunn, Des Moines, has directed and acted as moderator of the Iowa Roundtable program since its beginning on April 13, 1941.

The Iowa Roundtable has served as a public forum for the expression of public reaction to matters of foreign policy, domestic concern and, during World War II, emphasized attitudes supporting emergency matters.

The program is the oldest radio program produced by any bar association in the United States. The broadcasts, usually produced in Des Moines, have included more than a thousand different participants from all over the world.

Woltz Studios

400th Iowa Roundtable Program (left to right) William O. Weaver, Wapello, Wendell B. Gibson, Des Moines, Hiram S. Hunn, Des Moines, Woody Woods, Des Moines, Manager of Radio Station WHO, Robert B. Throckmorton, Des Moines, Herschel Langdon, Des Moines, and Ty M. Ingersoll, Cedar Rapids.

Third Annual Traffic Court Contest Awards

■ Six hundred and one cities participated in the third annual Traffic Court Contest of the American Bar Association conducted by the Section of Criminal Law. The committee again used the facilities of the Annual Inventory of Traffic Safety Activities and invaluable staff assistance of the National Safety Council.

The committee is pleased to report that there have been many improvements in practices and procedures in urban traffic courts since the inauguration of this contest. The progress achieved during the past year indicates that the contest is fulfilling the objectives set out in the authorization received from the House of Delegates.

The most encouraging aspect of this contest is that previous winners of awards have continued to make additional improvements in their practices and procedures.

The committee makes awards to the following sixteen cities:

GROUP I—Cities with population of over one million:
1st Place—Los Angeles, California
Honorable Mention—Detroit, Michigan

GROUP II—Cities with population between 750,000 and one million:
Honorable Mention—Cleveland, Ohio
Honorable Mention—Baltimore, Maryland

GROUP III—Cities with population between 500,000 and 750,000:
Honorable Mention—Minneapolis, Minnesota

GROUP IV—Cities with population between 200,000 and 500,000:
1st place—Denver, Colorado
2nd place—Cincinnati, Ohio

GROUP V—Cities with population between 100,000 and 200,000:
1st Place tie—Evansville, Indiana
Salt Lake City, Utah

GROUP VI—Cities with population between 50,000 and 100,000:
1st Place—Covington, Kentucky
2nd Place—Pasadena, California
Honorable Mention—Montgomery, Alabama
Honorable Mention—Evanston, Illinois

GROUP VII—Cities with population between 25,000 and 50,000:
1st Place—Watertown, New York

GROUP VIII—Cities with population between 10,000 and 25,000:
1st Place—Greeley, Colorado
2nd Place—Las Vegas, Nevada

Suitable plaques and certificates will be presented to each city at appropriate ceremonies in the traffic courtroom.

Law and Literature

(Continued from page 894)

tory is now so great and so secure that we are apt to forget that Lincoln was in his beginnings an accomplished lawyer. It was from his lips that there came the noblest short speech in the history of the language. Ten sentences were spoken in five minutes but they will continue to reverberate in the world until the language dies. The simplicity of diction in that speech is perhaps the secret of all great oratory. But whence came this power of Lincoln's to express himself in simple and lucid English?

The popular view is that the great President uttered the Gettysburg speech in a moment of supreme inspiration after Mr. Everett, the orator of the day had spoken for nearly two hours; but the truth is that it was all written out and fashioned with the greatest care.

Lincoln, no doubt, had great natural gifts, but there can be no doubt that his habit of reading all his life gave to him that sense of style and that choice of words that have placed him among the immortals in this respect, too. We are told that as a boy he read everything that he could lay his hands on and some of the books were *Robinson Crusoe, Aesop's Fables, The Pilgrim's Progress,* the Authorized Version of the Bible, Weem's *Life of Washington,* Burns and Shakespeare, and (Heaven preserve us) the Revised Statutes of Indiana. If these statutes were anything like those we have at home, they were certainly a great contrast to *Robinson Crusoe* and I shall say a further word about them in a moment. But I want to interpolate here another word about the Gettysburg speech.

Four and a half months before he made it, he had spoken of the battle of Gettysburg and had referred to the founding of the Republic as taking place "eighty odd years since". In the Gettysburg speech so carefully phrased, the famous opening sentence you will remember was "Four score and seven years ago, our fathers brought forth upon this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal".

Words in Right Order Have Magical Power

Now, words in their proper order are the raw material of the law, and words have a magic of their own; they have color and sound and meaning and associations. But choice words in the right order have a more magical power still. It was an English writer who said: "You take a few words, you put them together and in a way not explicable, they flash into life and you have not a sentence but a song, a revelation, a new creation, a joy for ever. The difference between "Great is Diana of the Ephesians" and "Diana of the Ephesians is great" is as wide as the difference between a revolution and a peaceful protest. "The Vision and the Faculty Divine" opens a window on the Infinite, but "Vision and the Divine Faculty" lets in no light upon us.

Lincoln was in possession of this secret and the contrast between "Four score and seven years ago" and "Eighty-odd years since" will not be lost on all those who wish to use language in its most acceptable and most attractive form.

I wish I had time to spend in a little detail upon Lincoln. Just let me add this and leave it. He was also, because of that reading, the author and composer of some of the wisest and pithiest and choicest sayings in the world. One only will I give you which I suppose is very familiar to you: "A woman is the only thing I am afraid of that I know will not hurt me."

Advocate Must Master Words If He Would Persuade

Now, then, the advocate, therefore, must have the faculty, innate or acquired of being able to use the right words in the right order, if he desires to be a master of the art of persuasion, and this could never come merely from reading the Revised Statutes of Indiana. The historian, Clarendon, when speaking of Coventry, the Lord Keeper of Charles the First's day, said, "He had in the plain way of speaking and delivery without much ornament of elocution, a strange power of making himself believed—the only justifiable design of eloquence." This comes, I must insist, primarily from the man himself and from the form and content of his expression.

Now, because the lawyer finds words to be the raw material of his profession, he must find the words appropriate to the occasion. I spoke a few moments ago of the Revised Statutes of Indiana. For many purposes the law must avoid what I may call the literary use of words. It must be content to use language shorn of all color or ornament in order to gain clearness. No doubt it often fails of its purpose and the history of litigation in England is a continuing testimony to that failure. But on the occasions when these considerations are not paramount the law has many examples of noble English to show.

As an illustration, if you want to see language employed by the advocate in its simplicity and in its strength, let me quote to you what we regard in England as the finest opening by the counsel for the defense in a murder case ever known. It was by John Inglis, the Dean of Faculty, when he appeared in the great trial of Madeleine Smith.

> Gentlemen, the charge against the prisoner is murder, and the punishment of murder is death, and that simple statement is sufficient to suggest to you the awful nature of the occasion which brings you and me face to face.

And in many of the judgments of English judges it may be truly said that law and literature came into their own.

Connection Between Law and Literature Is Long and Honorable

There has always been a long and honorable connection between law and literature. The books which lawyers have themselves written of the law and about the law are of course very many. I am glad to have

upon my shelves at home many such American and Canadian books. But it is of course the life of the law in England that I know best. Some legal books have become the possession of the world. Blackstone's *Commentaries on the Laws of England* first published in the years 1765 to 1769 was one of the great events in legal history, and marked the first beginnings of true legal education in England. Jeremy Bentham said that book first taught jurisprudence to speak the language of the scholar and the gentleman.

But quite apart from what may be called law books, the contribution of law to literature has been immense. I happen to be a Bencher of the Inner Temple, and whilst the former glories of the Inns of Court have in a large measure departed, some things abide throughout the centuries. Clarendon who wrote the history of *The Great Rebellion* was a member of the Middle Temple; Bacon with the *Essays* and the outpourings of that noble mind, is the glory of Gray's Inn; Sir Thomas More with his *Utopia* is the great son of Lincoln's Inn; and John Selden with his *Table Talk* belongs to the Inner Temple. Henry Fielding wrote *Tom Jones* in Pump Court; Cowper of the lovely Olney hymns came from the Middle Temple (we had one in the Cathedral on Sunday, though that was written by Newton) —Burke, Sheridan, De Quincey, Thomas More, R. D. Blackmore and *Lorna Doone*, Thackeray and a hundred others.

Dickens' Books Might Be Legal Texts

Charles Dickens was steeped in the traditions of the law and some of his books might even be made textbooks. In the famous action of *Bardell* v. *Pickwick* you may remember that the presiding judge, Mr. Justice Stareleigh, always called Mr. Serjeant Buzfuz "Brother Buzfuz". This was because they both belonged to the ancient order of serjeants-at-law, and though serjeants-at-law are now abolished, if you walk into the Royal Courts of Justice in the Strand today you will hear the judges of the King's Bench Division still calling each other "Brother" as if the old order of serjeants-at-law still survived. Samuel Pepys had a very close connection with the Temple. In the famous diary for 1662 he records: "I walked an hour in the Temple Garden recording my vows which it is a great content to me to see how I am a changed man in all respects since I took them." And then he records the purchase of a very scandalous book from one whom he calls "my bookseller in the Temple", which book says he "is a mighty lewd book, but yet, not amiss for a sober man once to read over to inform himself of the villainy of the world".

It is not possible for us all to go to the great universities, to spend years in the study of history or the classics or literature generally; and yet we would fain aspire to the great rôle of the finished advocate. There have been many, denied the larger and more glorious opportunities, who have made themselves familiar with the cadences of the Authorized Version of the Bible, that unrivalled storehouse of majestic English, and some of the greater masterpieces of our literature who have found therein a great enlargement of the faculties. The native energies of the mind have been thereby liberated, and all the perceptions immeasureably quickened. To live in books with the great and wise spirits of all time is somehow to feel their virtue and mysteriously to share it; and all these things to the advocate in the exercise of his art are beyond rubies.

Let me end with a renewal of my heartfelt thanks to your two Associations, and to express my fervent good wishes for the years to come. The greatest need of this unhappy world is a return to the universal rule of law, and the spread of universal justice among all the nations.

"Who shall put his finger on the work of Justice and say 'It is there'? Justice is like the Kingdom of God —it is not without us as a fact; it is within us as a great yearning."

From this statement of George Eliot your two Associations are never likely to dissent, and though the age of universal justice may seem at times far off, the ideal is at least discerned, and the life of every lawyer, however circumscribed his sphere may be, lived in the light of that great ideal not only brings honor to the profession but also brings the day of attainment nearer.

We cannot kindle when we will
The fire that in the heart resides
The spirit bloweth and is still
In mystery our soul abides:
But tasks in hours of insight willed

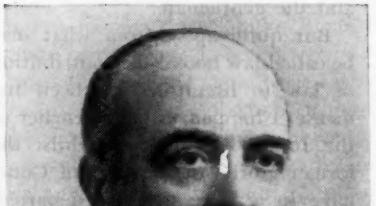
Can be through hours of gloom fulfill'd.
With aching hands and bleeding feet
We dig and heap lay stone on stone;
Not till the hours of light return,
All we have built do we discern.

Proceedings of the House of Delegates

September 18-22, 1950

■ The House of Delegates of the American Bar Association met for six sessions during the 73d Annual Meeting in Washington, D. C., September 18-22, 1950. This is our customary detailed summary of the debates on the floor of the House, together with the complete text of all resolutions adopted by the House (except for a few dealing with technical changes in existing statutes, too long to be printed here, and a few of merely routine nature). This summary of the proceedings of the House is an elaboration of the actions reported in the October issue of the *Journal*, at pages 818-819. A similar detailed account of the proceedings of the Assembly will appear in a later issue of the *Journal*.

The first session of the House was largely devoted to the reports of the officers of the Association and of the Board of Governors. The House heard the report of the Committee on Ways and Means dealing with the possibility of purchase of a twelve-acre estate at Des Moines, Iowa, to be used as a Headquarters building, and heard debate on the question of raising dues of the Association. It approved appointment of a special committee to coöperate with the Senate Committee which is investigating organized crime and voted to adopt a resolution favoring a national legal holiday to be known as "I Am an American Day".



JAMES R. MORFORD
Chairman, House of Delegates

FIRST SESSION

■ The House of Delegates convened in the Presidential Ballroom of the Hotel Statler in Washington, D. C., at 2:00 P.M. on Monday, September 18, for its first session at the 73d Annual Meeting. President Harold J. Gallagher of New York presided.

After the roll call by Secretary Joseph D. Stecher of Ohio, Glenn M. Coulter of Michigan, Chairman of the Committee on Credentials and Admissions, reported approval by the committee of the roster of the House as read by the Secretary. He then reported that his committee had approved the applications of the Columbus Bar Association (Ohio) and the American Patent Law Association to have delegate representation in the House. On his motion, the House voted to admit the two associations as affiliated legal organizations.

President Gallagher then made his annual report to the House of Delegates. He said that during the last year, the Association's membership has increased to 43,000, the highest in its history, and a net increase of 1900 members since the last Annual Meeting. Under the heading "Major Objectives Emphasized During the Year", he listed them as the strengthening of the ties between the American Bar Association and state and local associations, improvement of the administration of justice through adoption of "Minimum Standards of Judicial Administration", extension of legal aid societies and lawyer reference service plans, promotion of a comprehensive program of education in American citizenship, prevention of the unauthorized practice of the law, promotion of higher standards for legal training and admission to the Bar, and insistence upon maintenance of the highest ethical standards in the profession.

Lawyers Must Be Leaders in Critical Days

Mr. Gallagher said that in these critical days it is more important than ever for lawyers to assume leadership in their communities, and that the primary purpose of the efforts to coördinate the activities of the American Bar Association and the state and local associations is to achieve a unity of purpose so that lawyers can carry out the objectives of the profession. As a part of the

plan, he said that Regional Meetings would be held in Atlanta, Georgia, and St. Louis, Missouri, during the next year, and that plans for two other Regional Meetings were being formulated. He praised the Conference of Bar Association Presidents as an important aid in welding together the Bars of the several states and the American Bar Association in a common purpose. He mentioned the proposed office of Director of Activities as another means of achieving bar association coördination, and recommended that the House approve the proposed amendment to the By-Laws of the Association which would allow each President to appoint two members of the Public Relations Committee. He said that he heartily concurred in the recommendations of the Committee on Scope and Correlation (see page 952). He declared that he agreed with the Board of Governors' recommendation for an increase of dues for the fiscal year beginning July 1, 1951 (see page 950). He concluded by urging the members of the House to try to increase interest of members of the local associations in the work of the American Bar Association.

James R. Morford, Chairman of the House of Delegates, then assumed the chair.

Upon the motion of Secretary Stecher, the House then voted to approve the record of the February meeting of the House in Chicago.

Secretary Stecher then announced that the following had been nominated to be officers of the Association for terms beginning at the adjournment of the 1950 Annual Meeting:

For President—Cody Fowler of Florida
For Chairman of the House of Delegates—Roy E. Willy of South Dakota
For Secretary—Joseph D. Stecher of Ohio
For Treasurer—Harold H. Bredell of Indiana
For member of the Board of Governors for the Fourth Circuit—Walter M. Bastian of the District of Columbia
For member of the Board of Governors for the Seventh Circuit—Albert J. Harno of Illinois
For member of the Board of Governors for the Eighth Circuit—Frederic M. Miller of Iowa

Mr. Stecher said that the nominations had been duly published in the JOURNAL and that no other nominations had been received. The House then unanimously elected these nominees to the offices for which they were nominated.

William P. MacCracken of the District of Columbia then gave the report of the Board of Elections.

The House elected James L. Shepherd, Jr., of Texas to succeed himself as a member of the Committee on Scope and Correlation.

Board of Governors' Report Given by Secretary

The next order of business was the report of the Board of Governors, given by Secretary Stecher. He reported the following actions by the Board:

(1) Approval of the following resolution submitted by the Section of Patent, Trade-Mark and Copyright Law:

> RESOLVED, That the American Bar Association disapproves Reorganization Plan No. 5 of 1950 pertaining to the Department of Commerce, unless and until the Patent Office is specifically excepted from the provision of said plan. BE IT FURTHER
>
> RESOLVED, That the Chairman of the Section of Patent, Trade-Mark and Copyright Law be authorized to transmit copies of this resolution to appropriate members of Congress and to such other persons as he may select.

(2) Approval of the following resolution submitted by the Standing Committee on Commerce:

> RESOLVED, That the American Bar Association disapproves of the amendments to Sections 4 and 5 of the Clayton Act as embodied in Section 4 (c), Section 5 (a), and Section 5 (b) of the Denton Bill, H. R. 7905, and that a representative of the Commerce Committee, designated by the President of the American Bar Association, be authorized to appear before committees of Congress and present the objection thereto of the American Bar Association.

(3) Approval of two recommendations submitted by the Standing Committee on Scope and Correlation of Work. These related (a) to requests to the American Bar Association Endowment to make available to the American Bar Association sufficient money from the Cromwell bequest to establish, maintain and operate a library of legal publications; and (b) employment of a Director of Activities.

(4) Approval of four Regional Meetings during the year 1950-1951. These include Atlanta (March), Dallas (April) and St. Louis (May).

(5) Approval of the report of a subcommittee appointed to consider revision of the form of the application blank for membership in the Association.

(6) Adoption of the following regulation for the treatment of applications for membership received from former members that have been dropped for nonpayment of dues:

> Applications for membership by former members of the Association, who have been dropped from membership for nonpayment of dues, must be accompanied by tender of past dues for six months as well as by tender of current dues computed as provided in Article II, Section 2 of the By-Laws.

Mr. Stecher explained that members delinquent in their dues continue to receive all the benefits of membership, including the JOURNAL, for six months after their default, and that this provision was made with the feeling that it was but fair that those later reapplying for membership should pay dues for the period during which they had received all the privileges of membership.

(7) Promulgation of the following declaration of policy as to balloting for Assembly Delegates:

> In keeping with accepted standards for the conduct of public elections, it is hereby declared to be undignified and improper for members of the Association to loiter or congregate at or near the ballot box during the balloting for Assembly Delegates, and it is declared to be also improper for any person at or near the ballot box to solicit or in any manner attempt to influence any member in casting his vote.

(8) Determination that the prize-winning essay in the 1950 Ross Essay Contest was that of Norman C. Melvin, Jr., of Maryland, and the selec-

tion of the topic for the 1951 contest as follows: "The First Ten Amendments: the Character, the Status, and the Relative Importance and Dignity of the Rights Guaranteed Thereby".

(9) Determination that the Mid-Year Meeting of the House of Delegates should be held February 26-28, 1951, at the Edgewater Beach Hotel in Chicago, that the State Delegates should meet February 27 to nominate officers for the year 1951-1952, that the next Annual Meeting be held in the City of New York beginning Monday, September 17, 1951, and that the annual conference of Section chairmen be held at the Drake Hotel in the City of Chicago on Sunday, November 12, 1950.

(10) Adoption of the following resolution and its referral to the Junior Bar Conference for implementation:

> That the American Bar Association take steps to secure a reasonable period of time after the call to active duty in the Armed Services of the United States of lawyers in private practice to adjust their affairs and the affairs of their clients.

(11) Return to the Standing Committee on Professional Ethics and Grievances of a report in regard of a resolution respecting the conduct of the Solicitor General of the United States, with a request that it submit its recommendations to the Board.

(12) Adoption of the following resolution:

> Resolved, That a special committee be appointed by the President and the Chairman of the House, such committee to consist of the Executive Secretary and such number of members of the Board and the House as the appointing officers shall determine, to investigate the desirability of purchasing Salisbury House in Des Moines, Iowa, and report to the Board of Governors.

Secretary Stecher said that the Chairman of the Committee on Ways and Means would give further information on this subject to the House in his report (see page 951).

House Votes To Approve Board's Report

Mr. Stecher then moved that the report of the Board of Governors be adopted. In reply to a question by Whitney North Seymour of New York, he said that the question of changing the membership application form was not submitted to the House for approval because the By-Laws confer that power on the Board, but had been reported merely for the information of the House. The House then voted to approve the report of the Board of Governors.

Secretary Stecher then submitted to the House for approval a recommendation by the Board that a commission of seven members be appointed to cooperate with the Special Committee of the United States Senate To Investigate Organized Crime in Interstate Commerce by making a study of the need for modernization of rules, procedure and practices in the field of criminal law. The recommendation authorized the commission to employ an executive secretary and to solicit funds for carrying on its work.

W. E. Stanley of Kansas said that the recommendation called for appointment of a commission with substantial activities and he moved that action on the proposal be referred to the Committee on Scope and Correlation of Work for a report at the Mid-Winter Meeting of the House. The proposal to refer carried. The House later voted to rescind this action (see page 951).

Secretary Stecher then moved that a second recommendation of the Board be approved by the House. This would have raised the dues of the regular members of the Association from $12 per year to $16, the dues for members during the first two years after their original admission to practice from $3 to $4, and the dues for members during the third, fourth and fifth years after their original admission from $6 to $8.

W. E. Stanley of Kansas, Chairman of the Committee on Ways and Means, said that his committee had reported adversely to the Board of Governors on a proposal to increase dues for regular members to $25, and that that committee had heard of this proposed increase to $16 only since its arrival in Washington.

Karl C. Williams of Illinois inquired whether the Board had considered remission or deferment of dues for members entering the Armed Forces. Chairman Morford said that it had not.

Robert F. Maguire of Oregon moved to amend the motion so as to set the dues at $4 per year for all members during their first five years after original admission to practice.

In reply to a question of Mr. Stanley, Harold H. Bredell of Indiana, Treasurer of the Association, said that, while membership in the Association increased by 1200 members during the last fiscal year, the amount of money the Association received from dues had not increased at all, because most of the new members were younger men admitted at the two-year rate. The cost of the basic services of the Association, without including money spent for maintenance of the Sections, committees and general work of the Association, was $6. The increase in dues had been considered carefully, he said, and was recommended to eliminate some of the loss that the Association now has on junior members' dues.

Edward A. Dodd of Kentucky moved that the proposal to increase dues be referred to the Committee on Ways and Means for study and report through the Board of Governors at the Mid-Year Meeting.

William S. Hamilton of Oklahoma said that he thought that the House should act immediately on the proposal. The Association needs the money, he declared, and there is no reason why any lawyer should not contribute a sufficient amount for his membership to make him realize the fact that he is a member of a real organization.

Secretary Stecher commented that the Junior Bar Conference had no objection to the Board's recommendation.

Mr. Maguire spoke in favor of the motion to refer. He said that the Association was trying to attract younger lawyers to its ranks and that the Association might well make some financial sacrifice to this end.

B. Allston Moore of South Caro-

lina said that an increase of four dollars was substantial for many senior members, and that there might be a decrease in membership if the dues were raised.

Carl McFarland of the District of Columbia said that he saw nothing unreasonable in the proposal to increase dues—all organizations in the country need more money to operate these days, he said.

John R. Snively of Illinois said that he favored the recommendation of the Board. The Illinois State Bar Association raised its dues from ten to fifteen dollars a year, he remarked, and it had not noticed any decrease in payments.

William Poole of Delaware said that the increase could not go into effect before July 1, 1951, in any event.

The House then voted 68 to 62 in favor of deferring action until the Ways and Means Committee reports at the Mid-Year Meeting.

Committee on Ways and Means Reports on Des Moines Building

W. E. Stanley of Kansas then gave the report of the Committee on Ways and Means of which he is Chairman. He said that the Association's building fund was now $200,385.42, and recalled the need for a new Headquarters building. In that connection, he then told the House in detail of an opportunity to acquire a three-story building and twelve acres of ground in Des Moines, Iowa, for the sum of $100,000. He described the building in detail, saying that it is modeled after a residence within the Cathedral Close in Salisbury, England. The place was built to be a private residence, he said, and was later given to Drake University, which could not use it because of the distance from its campus. The building is well suited to the needs of the Headquarters, he declared, and would cost $4,000,000 to duplicate today. It is offered to the Association because of the desire of the builder to place the structure in the hands of an organization that will preserve it. A committee has been appointed to go to Des Moines to look the property over, he said, and no action is asked by the House at this time since, in approving the report of the Board of Governors, the House had concurred in the appointment of an investigatory committee.

Harold H. Bredell Gives Treasurer's Report

The House then heard the report of the Treasurer, Harold H. Bredell of Indiana. He said that he hoped that the members would give some attention to the question of dues, and reported that the Association had a surplus balance of some $2500 in the general fund. This did not include $14,033 which the Board of Governors decided to appropriate to the building fund, so that the total unexpended amount of general funds was $16,533 he reported. This was accomplished only by the exercise of strict economy, he declared. All Sections of the Association have kept within their current or accumulated funds. He expects no great change during the next year, he continued, unless there is a decided change in the number of members.

Albert B. Houghton of Wisconsin, Chairman of the Board of Governors' Committee on Budget, reported for that committee. He said that the Association's general fund income has exceeded half a million dollars for the first time in its history. For the fiscal year 1950-1951, the Association's total estimated income is $480,500, and against this are appropriations of $508,484. It should be noted, he said, that there are certain items about which the Budget Committee has no discretion, since it is obligated to appropriate money for them. These items include such matters as the operations of the Headquarters office, the Annual Reports, expenses of meetings, and the like, he said, and when those matters are taken care of there remains only about $100,000 to be divided among the Sections and Committees. The larger appropriations for the current fiscal year include the following, he reported:

Survey of the Legal Profession	$10,000
Traffic Court Committee	5,000
American Law Student Association	6,000
Junior Bar Conference	11,500
Section of Judicial Administration	5,000
Section of Legal Education	12,500
Committee on Regional Meetings	10,000
Committee on American Citizenship	3,500
Committee on Legal Aid	7,500
Committee on Lawyers Reference Plan	1,750
Committee on Public Relations	7,500
Committee on Unauthorized Practice of the Law (Including *Unauthorized Practice News*)	10,000
Committee on Ways and Means	3,000

Mr. Houghton said that if Section and committee chairman could make 95 cents do the work of a dollar, the Association would again come out in the black.

President Gallagher then requested the House to reconsider its action referring a proposal to create a commitee to investigate organized crime to the Committee on Scope and Correlation (see page 950). A motion to reconsider was made and seconded, and Mr. Gallagher explained that Senator Kefauver had requested the coöperation of the American Bar Association in the study of organized crime. He said that former Secretary of War Robert P. Patterson had agreed to head the Association's commission, and that to delay action on the proposal would be to put it off while the rest of the country has been giving coöperation to the Senate investigation.

Jacob M. Lashly of Missouri said that he thought that the House should approve. It would be excellent public relations, he observed.

The House voted to approve the appointment of the commission, thus rescinding its previous action.

John C. Cooper of New Jersey, Chairman of the Committee on American Citizenship, reported for that committee. He said that it has been sending out memoranda to the state bar associations and to various others on citizenship questions. These memoranda acquaint the people of local communities with what

the bar associations desire to do and inform the state associations as to what other associations are doing. The bulletins include material for citizenship programs as well, he said.

He moved the adoption of the following resolution:

> RESOLVED, That the American Bar Association urges the Congress of the United States to adopt a resolution of the general tenor of S. J. Resolution 104 heretofore introduced and now pending, pursuant to which Constitution Day and Citizenship Day ("I Am an American Day") would be combined and celebrated on a single day to be fixed by the Congress and annually proclaimed by the President of the United States.

The House voted unanimously to adopt the resolution, and then recessed.

SECOND SESSION

■ This session was entirely devoted to a consideration of various amendments to the Constitution and By-Laws of the Association. Among other changes, the House approved amendments to the Constitution setting up the office of Director of Activities and changing the tenure of the members of the Committee on Public Relations. A proposal to make the Chairman of the House of Delegates the presiding officer of the Board of Governors was defeated, and a proposal to create the office of President-Elect was referred to committee for report at the February meeting of the House.

■ The House reconvened at 9:40 A.M. on Wednesday, September 20, for its second session.

This session was devoted to consideration of the proposed changes in the Constitution and By-Laws of the Association. Roy E. Willy of South Dakota, Chairman of the Committee on Rules and Calendar, presented most of them for the consideration of the House.

The first amendment proposed by Mr. Willy was a change in Article X, Section 7, Subsection (p), Paragraph (1) of the Constitution, so that it would read as follows:

> (p) *Committee on Public Relations.*
> (1) This Committee shall consist of five members appointed by the President and four ex-officio members, to-wit, the President, the Chairman of the House of Delegates, the Chairman of the Public Information Program of the Junior Bar Conference, and a member to be designated annually by the Board of Editors. In the original appointment of the Committee, the President shall designate two members to serve until the adjournment of the first annual meeting following their appointment, two to serve until the adjournment of the second annual meeting following their appointment, and one to serve until the adjournment of the third annual meeting following his appointment, but thereafter successors shall be appointed for a three-year term. The President shall designate a Chairman annually.

Mr. Willy explained that this amendment would fix the tenure of the members of the Committee on Public Relations so that it would be in harmony with that of the other standing committees of the Association.

William W. Evans of New Jersey spoke for the proposition. He said that it was felt that, since the official head of the Association changes each year, it would expedite and aid the incumbent administration if it could appoint a larger number of members of the Public Relations Committee.

George Maurice Morris of the District of Columbia said that he was opposed to the amendment. He recalled that the present composition of the Public Relations Committee had been established to give continuity to its work. Some lawyers feel that public relations is all-important, he continued, while others are inclined to think that no amount of public relations will make lawyers popular. A real program of public relations will mean the spending of large sums of money, he said, and it is important to have at least four men on the Public Relations Committee with the experience necessary to prevent extremists in their views about public relations from running with the bit faster than the members of the Association wish to go.

President Gallagher spoke in favor of the amendment. He said that it was important that the President be able to take part in the formation of the committee, since it is his responsibility to see to it that the work is carried out. The present committee is composed of members who are widely separated and no really effective meeting could be held during the last year, he said.

Carl B. Rix of Wisconsin said that his view differed from that of Mr. Gallagher. The President for any particular year should not determine the policies nor be allowed to overfeature any one particular element, he said, because a sound system of public relations cannot be built on any such changing basis.

Mr. Evans, in closing the debate, said that a good committee is continued from year to year anyhow, as a rule, and that he does not subscribe to the notion that the membership of Association committees is so "flighty, uncertain and unreliable that we have to put them in for five years before we can civilize them".

The House voted to approve the amendment.

Change in Election of State Delegates Is Postponed Until February

Mr. Willy then turned to another amendment which would have changed the method of filling vacancies in the office of State Delegate. He said that this problem is a difficult one, and that it is recognized that the machinery for filling vacancies is not satisfactory, but that it was also felt by his committee that the proposed amendment would not accomplish all that its sponsors hoped. He moved that the matter be referred to the Committee on Scope and Correlation with instructions to report at the Mid-Year Meeting. The House voted to do so.

The next amendment was one relating to the manner of electing members of the Association so as to eliminate all questions about race and religion from the membership application blank. Mr. Willy said that there is no racial discrimination in the election of members, and that in the

opinion of his committee, no good reasons exist for changing the present method. He moved to reject the amendment, and the House voted unanimously to adopt the motion.

The next amendment voted by the House merely eliminated a reference to a section of the Constitution which had been repealed, the reference having been left in by typographical error.

Another purely mechanical change, eliminating Article XIV of the Constitution which relates to "Taking Effect of the Constitution", was approved by the House after Mr. Willy explained that it was felt that this article was archaic, since it is self-evident that the Constitution is in effect.

Another mechanical change voted by the House eliminated a provision for the payment of joint dues by state associations so as to bring all their members into the American Bar Association. The provision has never been used, Mr. Willy explained, and there was a serious question of its propriety, particularly in view of the nature and character of our present organization.

The House also voted for a provision to eliminate a reference in Article III, Section 1 of the By-Laws to the first organizational meeting of the House. This reference was also regarded as archaic.

The House approved a provision that added the Committee on Unemployment and Social Security and the Committee on Peace and Law through United Nations to the list of Standing Committees in Section 6 of Article X of the By-Laws and changed the numbering in Section 7 to keep the list of Standing Committees in alphabetical order.

Chairman of House of Delegates Made Its Permanent Presiding Officer

W. E. Stanley of Kansas, speaking for the Committee on Scope and Correlation, moved the adoption of a change in the Rules of Procedure of the House of Delegates and in Article 6, Section 9 of the Constitution so as to make the Chairman of the House of Delegates the presiding officer of the House instead of the President. Mr. Stanley explained that this amendment in effect would recognize the fact that the Chairman of the House is the presiding officer of that body since the President has other duties and responsibilities. The motion was carried.

Mr. Willy then moved the adoption of an amendment to Section 4 of Article VIII of the Constitution so as to add the office of Director of Activities to the list of offices to be filled by the Board of Governors. In its amended form, the section reads:

> The Board of Governors may elect, and may prescribe the duties of, a Director of Activities, an Executive Secretary, one or more Assistant Secretaries and one or more Assistant Treasurers, each of whom shall hold office at the pleasure of the Board of Governors. The Director of Activities shall be a member of the Association. The Executive Secretary and other employees need not be members of the Association.

W. J. Jameson of Montana, speaking for the Committee on Scope and Correlation, said that this proposal was the result of an extensive study made over a period of more than a year. The committee had come to the conclusion that under the present system, there was an undue burden on both the Executive Secretary and the President, he said, and that a Director of Activities would relieve the President of a number of administrative duties and would likewise relieve the Executive Secretary of the difficult task of keeping track of the many Sections and committees of the Association in addition to the duties of running the Headquarters office. The Director of Activities, he explained, would be particularly important in coördinating the work of the Association with that of state and local associations. The amendment would not interfere with the duties or prerogatives of the President in any way, he said, and the Board of Governors and the House and Assembly would remain as the policy-determining bodies.

Thomas B. Gay of Virginia suggested that the title "Executive Vice President" would be better than "Director of Activities".

Mr. Jameson replied that the committee had considered that title and had decided on "Director of Activities" as more desirable; however, he said, the committee had no particular objection to calling this new officer "Executive Vice President".

In reply to a question put by Samuel H. Liberman of Missouri, Mr. Jameson said that the Director of Activities would be a paid employee of the Association, working full-time under the Board of Governors.

The motion to amend the Constitution to create such an office was put to a vote and carried.

Mr. Willy then asked the House to consider one more amendment to the Constitution necessitated by a typographical error. The amendment, which was approved by the House, included Section Chairmen as well as committee chairmen among those persons, not members of the House, who are entitled to the right of appearance and privilege of the floor but not entitled to vote at House sessions.

Chairman of House Proposed as Presiding Officer of Board

The House then turned its attention to a proposal to amend the Constitution so as to make the Chairman of the House of Delegates the presiding officer of the Board of Governors. W. E. Stanley of Kansas, who presented the matter to the House, said that the Board of Governors is a committee of the House and has the authority to take action for and on behalf of the Association in the period between meetings of the House, and that therefore the Committee on Rules and Calendar and the Committee on Scope and Correlation felt the presiding officer of the Board should be the Chairman of the House. He said that in many organizations the President was not the chairman of the executive committee and that more effective work was done as a result, since the President has much to do with the presentation to the Board of matters which affect questions of policy. As presiding officer of the Board, he is handicapped when he must present these to the Board both as advocate and presiding officer, Mr. Stanley said.

Cuthbert S. Baldwin of Louisiana said that he was opposed to the change. The President is elected to lead the Association during his term, he said, and he could see no good reason why he should not be entitled to preside over Board meetings, just as the president of any organization presides.

Frederic M. Miller of Iowa said that he thought Mr. Baldwin was incorrect in saying that the President of an organization usually presides at board meetings. He said that corporations usually have a chairman of the board.

Frank E. Holman of Washington said that he thought that adoption of the change might lead to a situation where the President would be in an inferior position if the Chairman of the House, as presiding officer of the Board, differed from the President. The President is now frequently overruled by the Board, he said, but he thought that the proposal would cut the office of President down to a mere nonentity, especially if he could not appoint the committees of the Board.

Charles E. Lane of Wyoming said that he agreed with Mr. Holman. The President is the policy-maker in the Federal Government, he pointed out, and he has his Cabinet. We should not take the dignity away from the President of the Association and make him a mere errand boy, he declared.

Joseph W. Henderson of Pennsylvania said that he too was opposed to the amendment. He does not agree that the President is merely an advocate before his Board, he said, and in his experience the Presidents of the Associations have always had the interests of the Association at heart and nothing else. The House of Delegates is the policy-making body, he continued, and a conscientious President is more closely in touch with what is going on than anyone else when the House is not in session.

Charles A. Beardsley of California said that presiding over the Board of Governors was only a small part of the President's responsibility insofar as the Board was concerned. He has the appointment of committees that largely control the policies of the Association, and if he is to have the best results he must have the backing of those committees.

In reply to a question posed by Mr. Maguire of Oregon, Mr. Stanley said that the proposed amendment did not remove the President's power to appoint Board Committees.

Mr. Holman said that he disagreed with Mr. Stanley's answer. The presiding officer of any board appoints its committees, he declared, and it would be anomalous to have a chairman of the Board who had no power to appoint the Board's committees.

Mr. Stanley said that the Board's committees are appointed largely for advisory purposes in connection with factual data necessary to be brought before the Board, and that he thought that it made little difference who appointed them.

Carl B. Rix of Wisconsin said that he feared that the amendment would be a serious mistake. There is often a conflict among the members of the Board, and involved in the question are the administrative policies that the President is trying to carry out, he said. If there is a controversy, the President must break the tie, he asserted, and it should not be broken by any other officer.

John T. Barker of Missouri said that he could see no reason for the amendment. "The President of this Association has presided over the Board up to this time. I can see no reason for this change, and I think it should be defeated", he declared.

Mr. Stanley, in closing debate on the motion to adopt the change, said that, with one exception, all the members who had spoken in opposition to the amendment had been past presidents. In his service on the Board, he said, he had often seen Presidents proceeding to put into effect their own ideas which the House of Delegates, which is the proper body to make policy, has never passed upon. The man who should preside at Board meetings is the man who has seen what has happened in the House, who has heard all the debates of the Delegates, he declared.

The amendment was then put to a vote and was lost.

House Debates Proposal To Create President-Elect

Mr. Willy then presented to the House a group of amendments to the Constitution that would have provided for the creation of the office of "President-Elect", which would be filled by an officer chosen a year in advance who would sit on the Board of Governors and thus acquire experience in the work of the Association before he assumed the office of President, Mr. Willy said. This amendment also contained a provision entitling former Chairmen of the House of Delegates to seats in the House for one year by registration at any Annual Meeting. This privilege is presently accorded past Presidents, Mr. Willy said, and the feeling was that Chairmen of the House should also receive it.

On motion of Thomas B. Gay of Virginia the latter question was separated from the question of the office of President-Elect, and was later passed without debate.

As for the question of creation of a President-Elect, David F. Maxwell of Pennsylvania said that he thought that the creation of the office of Director of Activities eliminated the need for a President-Elect.

Samuel H. Liberman of Missouri, speaking in opposition to a President-Elect, said that a President-Elect would from time to time differ with the President, and that the amendment would tend to diminish the position and prestige of the latter.

Cuthbert S. Baldwin of Louisiana said that the proposal would mean that the President-Elect would be chosen a year and a half before he was destined to take office as President, and that no one could guarantee that the man elected President-Elect so long before would make a good president at the time he took that office. He suggested that a vice president without the certainty of succession would be preferable.

Delger Trowbridge of California

said that the position of President involved so much work that it is not possible for one man really to cover the whole field. The American Medical Association has had a President-Elect for many years, he declared, and has found it very successful. The proposal would relieve the President of some of his burdens, he said; the Director of Activities, suggested by Mr. Maxwell as the man to do that, could not speak for the Association with the same effectiveness as a President-Elect, for the Director of Activities will be a paid employee of the Association. No President-Elect would be disloyal to the President in office, he declared.

Robert W. Upton of New Hampshire said that it was inevitable that a President-Elect would look ahead to his own year of office, and that it would be a miracle to find both a President and a President-Elect who would agree fully on what the policies of the Association should be. The amendment makes no provision for the duties of a President-Elect beyond making him a member of the Board of Governors, he said; "it would be a mistake to have a president *de facto* and a president *de jure* to direct the affairs of this Association", he added.

Frank W. Grinnell of Massachusetts said that he had come to the meeting with an inclination to support the proposal, but that after listening to the discussion he intended to vote against it "because I think it will make a mess".

Blakey Helm of Kentucky said that the President-Elect would be nominated for his office by the State Delegates, a number of whom would be out of office by the time he became President eighteen months after nomination.

Richard P. Tinkham of Indiana said that he was in favor of the amendment—the system it would set up is used in Indiana, he said, and is working very well there.

Floyd E. Thompson of Illinois moved to amend the proposal so as to substitute the words "vice president" for "president-elect". He said that he was opposed to having a President-Elect, but that he would establish a vice president who would gain experience and learn something of the administration of the Association, and who might then be elected to the presidency, but who would not automatically succeed to that position. This would eliminate the objections to the office of President-Elect, he declared.

Robert F. Maguire of Oregon said that the arguments both pro and con were substantial. He suggested that the nominee for President be permitted from the time of his nomination to sit with the Board of Governors without vote. He then moved that the matter be referred back to the Committees on Scope and Correlation and Rules and Calendar for further consideration and report to the House. This motion was carried, and the matter was referred.

The House also voted to refer to the committees other amendments which would have been necessary had the proposal to create a President-Elect been adopted. These amendments integrated the office of President-Elect into the wording of various sections of the Constitution. The House also voted to refer to the committees a proposal to make future Chairmen of the House of Delegates ineligible for the office of President of the Association.

The House then recessed at 11:40 A.M.

THIRD SESSION

■ At this session, the House heard the report of the Committee on Jurisprudence and Law Reform, and adopted the committee's resolution calling for a constitutional amendment to guarantee the Supreme Court's appellate jurisdiction in all constitutional cases. Among other actions, the House voted to disapprove the Draft International Covenant on Human Rights and approved a study of the problem of preventing use of the treaty-making power to change the fundamental structure of our federal system. The House also approved a joint study with the Canadian Bar Association of the means of strengthening international arbitral procedures, and adopted an amendment to Canon 28 of the Canons of Judicial Ethics.

■ The House reconvened at 1:40 P.M. on Wednesday for its third session.

Albert MacC. Barnes, Chairman of the Committee on Customs Law, gave the report of that committee. He said that at the February meeting of the House, it had adopted a resolution disapproving the Havana Charter for an International Trade Association. He reported that he had appeared before the House of Representatives' Committee on Foreign Affairs to present the views of the American Bar Association on the charter. He said that he desired to continue to carry out the purpose of the resolution, that is, to oppose in all honorable ways the passage of any legislation having to do with the creation of a treaty that will become law without any action by the United States Senate and without compliance with the Constitution. He called attention to what he termed a "rapid trend toward the increase in importance of trade agreements, economic or social agreements, with foreign nations as a basis for our domestic law and a disregard of the constitutional limitations on the exercise of the power to make treaties". He said that this was dangerous, and cited as an example the recent passage by the Congress of a bill taking treaties out of the Statutes at Large and providing for their publication in the House Organ of the State Department only.

Committee on Jurisprudence Reports to House

The House then proceeded to consider the recommendations of the Committee on Jurisprudence and Law Reform, presented by Walter P. Armstrong, Jr., of Tennessee the Chairman of the Committee.

He moved that the following resolution be adopted:

RESOLVED, That the proposed amendment to Rule 26 (b) of the Federal Rules of Civil Procedure, advo-

cated by the Insurance Law Section of the American Bar Association and heretofore referred to this Committee for study and report, be re-referred to the Insurance Law Section for further study and report by that Section.

He said that this proposed amendment to Rule 26 (b) had been referred to his committee for study after it had been recommended by the Section of Insurance Law. His committee did not want to oppose the recommendation of the Section, he said, but it was not yet convinced that the amendment was desirable, and this course was adopted so that his committee could have further enlightenment as to the reasons of the Section. The resolution was adopted without debate.

Mr. Armstrong's second resolution was as follows:

RESOLVED, That the American Bar Association disapproves, and opposes the enactment into law, of House Bill 7550 in the 81st Congress, entitled "A Bill to Amend Section 1404 of Title 28, United States Code, With Respect to the Transfer of Certain Civil Actions From One District to Another", and directs the Standing Committee on Jurisprudence and Law Reform to oppose its passage by all appropriate means.

Mr. Armstrong explained that it appeared to his committee that H. R. 7550 was an attempt to withdraw the principle of discovery from the statutory law, and that they believed that that principle should remain in the law. The resolution was adopted.

The third resolution of the committee presented by Mr. Armstrong would have placed the Association on record as favoring a federal statute limiting eligibility for appointment to the Supreme Court and the Federal Courts of Appeals to persons who shall "for a period of at least fifteen years immediately preceding [their] nomination have been engaged in the practice of law in one or more of the several states . . . or shall for such period have served as a member of a Federal District Court or Court of Appeals, or a court having original general jurisdiction in one or more of the several states . . . or a combination of judicial service and legal practice totalling such period". He said that there were several questions that had arisen with respect to the details of this provision, although the committee felt that some legislation of this sort was desirable. He said that the committee would not object to a motion for recommitment to it for further study.

Proposal Is Rereferred to Committee

Secretary Stecher reported that the Board of Governors had considered the resolution, and that the Board felt that it had much to recommend it but that in its present form it would exclude persons who are qualified. He moved that it be referred back to the committee for further consideration. This motion was carried, and the proposal was referred.

Mr. Armstrong then moved adoption of a resolution proposed by his committee that would have placed the Association on record as favoring a constitutional amendment giving the Supreme Court original jurisdiction to hear all cases involving the removal of federal judges except members of the Court. He said that this was an attempt to embody in the Constitution the principles originally contained in the Sumners Bill in Congress providing for a special tribunal to try federal judges and remove them for failure to live up to the standards of good behavior.

Robert F. Maguire of Oregon said that he was opposed to the resolution. The Supreme Court now has tremendous power over the district courts, he said, and to say that one branch of the judiciary, even the highest branch, should have the power of discipline and removal from office of judges is actually a means for the destruction of the independence of the judiciary.

Hatton W. Sumners of Texas said that the judges must be protected against the fear of unnecessary prosecution by those who are not pleased with how they have decided cases. At the same time, he continued, we must make it possible to remove judges who are unfit to hold office by the ordinary judicial procedure. It is impossible to get a trial in the Senate, he said, for the Senate is much too busy. The defendant judge has a right to have the issue of his fitness tried, he continued, and he has a right to that sort of procedure that will enable him to present the facts before someone who will listen to him. The Senators are legislators, not judges, he declared, and they cannot give a trial. If something is not done, he said, the executive is going to be able to exercise a tremendous power over judges on the Bench. Since the Senate cannot proceed to determine the issue of fitness, he remarked, the Department of Justice now takes the initiative in proceeding to examine whether or not a judge ought to be removed. That is not their business, he declared, and they ought not to have that sort of club to hold over the head of any man on the Bench. He was not intending to reflect upon anyone, he said; it simply was not right for the Department to have such power.

Whitney North Seymour of New York moved that the matter be recommitted to the committee for further study and report after conferences with Mr. Sumners and others. The motion was carried and the resolution was referred.

Mr. Armstrong then moved the adoption of the following resolution:

RESOLVED, That the American Bar Association approves the submission to Congress and the enactment into law of a bill to amend Section 551 of Title 38, U. S. Code, by adding thereto a provision substantially to the effect that in a controversy involving veteran's insurance a United States District Court, which has jurisdiction to hear and determine such controversy, upon petition and after hearing, may if the facts warrant and irrespective of the pendency of any action or the entry of any judgment or decree, award reasonable compensation to an attorney for a claimant and apportion such compensation among attorneys for different claimants, provided however that such compensation shall not exceed ten per cent of the aggregate amount received or to be received by the claimant or claimants represented by such attorneys.

BE IT FURTHER RESOLVED, That the Standing Committee on Jurisprudence and Law Reform be authorized to advocate the introduction and passage of such a bill in the Congress of the

United States by all appropriate means.

Mr. Armstrong explained that there was a limit of $10 on the fee for representing a client before the Veterans Administration or in connection with a claim on veteran's insurance. This is improper, he said, because it discourages the settlement of cases by attorneys before the final decree, since if settlement is made, the fee is limited to $10.

The resolution was adopted without debate.

Mr. Armstrong then moved that the House adopt the following resolution:

RESOLVED, That the American Bar Association approves the submission to Congress and the enactment into law of a bill to amend Section 1346 (a) of Title 28, U. S. Code, as amended by Section 80 (a), Public Law 72, Chapter 139, 1st Session, 81st Congress, May 24, 1949, by striking from Sub-section (1) thereof the words: "(i) if the claim does not exceed $10,000 or (ii) even if the claim exceeds $10,000, if the Collector of Internal Revenue by whom such tax, penalty or sum was collected is dead or not in office as Collector of Internal Revenue when such action is commenced."

BE IT FURTHER RESOLVED, That the Standing Committee on Jurisprudence and Law Reform be authorized to advocate the introduction and passage of such a bill in the Congress of the United States by all appropriate means.

Mr. Armstrong said that as the law now stands, a taxpayer who has a claim against the Government for taxes allegedly improperly paid or illegally collected can file suit in the District Court if the amount of the claim is under $10,000, while if it is more he must file suit in the Court of Claims. The committee cannot see any reason why a suit of that nature should not be prosecuted in the District Court, he said. The proposal would not deprive the Court of Claims of concurrent jurisdiction, he added.

George Maurice Morris of the District of Columbia inquired whether the Section of Taxation had reported on this proposal. Mr. Armstrong said that there had been no formal report from the Section, but that there had been correspondence between the officers of the Section and the committee and that he felt free to say that the wording of the resolution would meet with the approval of the Section.

Mr. Morris moved that this section of the committee's report be continued with directions to the Section of Taxation to report to the House before it was taken up again.

James L. Shepherd, Jr., of Texas said that he realized the importance of not taking any conflicting action, but that it seemed to him that this was a simple provision and that no time need be wasted by a referral to the Section.

The House then voted against referral and in favor of the resolution.

Mr. Armstrong then moved the adoption of the eighth resolution offered by his committee. This resolution reads as follows:

RESOLVED, That the Standing Committee on Jurisprudence and Law Reform is directed to examine and report to the House of Delegates of the American Bar Association upon the Legislative Reorganization Act of 1946, insofar as it applies to Lobby Registration, with a view to recommending certain amendments to that Act and the support by the American Bar Association of the enactment of such amendments.

BE IT FURTHER RESOLVED, That the Standing Committee on Jurisprudence and Law Reform is authorized, with the concurrence and approval of the Board of Governors of the American Bar Association, to appear before any committee of Congress engaged in considering any proposed amendments to the said Act and express the views of the American Bar Association in regard to such proposed amendments, should it be deemed necessary or advisable to do so prior to the Mid-Year, 1951, meeting of the House of Delegates.

Chairman Morford remarked that the second paragraph appeared to give the committee a "blank check" in representing the Association with respect to some matters of policy that had not been passed upon by the House.

Mr. Armstrong replied that it was not so intended. He said that the committee's purpose was to obtain authority to consult during the interim period between meetings of the House and to receive instructions from the Board of Governors during that period as to any statements to be made before a congressional committee on these matters.

James L. Shepherd, Jr., of Texas moved to amend the resolution by adding the words "after obtaining the approval of the Board of Governors". Mr. Armstrong accepted that amendment and the House voted to adopt the resolution in its amended form.

Committee Proposes Constitutional Amendment

Mr. Armstrong then turned the floor over to Walter E. Craig of Arizona to present the next resolution for the committee. This resolution was as follows:

RESOLVED, That the American Bar Association approves the submission to the Congress of the United States of an Amendment to Article III, Section 2, of the Constitution of the United States of America, establishing in the Supreme Court of the United States appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact.

BE IT FURTHER RESOLVED, That the Standing Committee on Jurisprudence and Law Reform be authorized to advocate the introduction and adoption of such an amendment to the Constitution of the United States by all appropriate means.

Mr. Craig said that the majority of the committee felt that there was no real opposition to the principle that the Supreme Court should have appellate jurisdiction in all cases arising under the Constitution, and that the only question seemed to be whether or not the time is propitious to introduce such a measure. In the opinion of a majority of the committee, he continued, in view of the state of affairs in the world today, now is the time "to mend our fences where we can".

Frank W. Grinnell of Massachusetts speaking in opposition to the resolution, called the attention of the members of the House to a communication that he had sent them explaining his views on the proposal. He said that this was not a question that should be raised at the present time, and that there was no reason

for raising it. The only case in which the Court's jurisdiction was removed was *Ex parte McCardle,* decided in 1868, he recalled, and said that he did not feel that there was any occasion for being so disturbed by that case as to stir up the controversy that he felt would be sure to follow if the resolution were adopted. It is a question of judgment, he observed; it is bad judgment for the Association to propose this measure and carry it before the people and before the Congress, where it will be fought. The result, he declared, will be to weaken respect for the law, the courts and the Bar.

John C. Satterfield of Mississippi recalled that the matter had been fully debated at several previous meetings of the House. He called attention to *Ex parte McCardle,* saying that it was dangerous to rest in a legislative body power to remove from consideration by a final tribunal legislation that is before the tribunal for a determination of its constitutionality. He pointed to the case of *Lockerty* v. *Phillips,* 319 U. S. 182 (1943), as illustrative of the point; there he said, under the Emergency Price Control Act, an Emergency Court of Appeals was vested with final jurisdiction to determine the constitutionality of the Act. In that case, he continued, you had a situation where "the Congress may pass a certain legislative enactment, may set up a court to determine the constitutionality thereof, may provide for the membership of that court by the appointment of the then President at whose recommendation the enactment was made and may provide that its determination shall be final". The resolution is very desirable, and it should be passed when there is no particular issue at which it is aimed.

Hatton W. Sumners of Texas said that the Supreme Court was not cramped for lack of jurisdiction now. Without criticising them, he had observed, he remarked, that it is doing pretty well and seems to have all it can do. Only tremendously basic principles should be embodied in the Constitution, he declared; the Constitution puts the responsibility for determining the composition of the courts on Congress, which is as close to the people as possible in a large country. About the only people who pay any attention to resolutions anyhow are the people who are opposed to the subject of the resolution, he said, and the only thing that this resolution would accomplish would be to put the Association in a position to "get shot at".

Former Justice Roberts Urges Adoption of Proposal

Former Justice Owen J. Roberts then closed the debate on the proposal.

The Constitution contains many compromises, he said, and the reason for many of its provisions are now buried. Why was the Court given such a narrow original jurisdiction? he asked. Quoting the *Federalist,* he said that the representatives of the states feared that if the Court could revise a state court's judgment, they would usurp the functions of a jury and overturn jury verdicts. The narrow original jurisdiction of the Court was the answer, he said; it was felt, "Oh, well, if the Court performs that way, let us give Congress the power to clip its wings." If the lawyers of the United States go on record as saying a thing is right, Mr. Justice Roberts declared, they need not worry about whether the people back home follow the torch they have raised or not. "I would rather be right, even though no action follows from a declaration of my profound convictions," he said. In a time of great emergency, Congress might shear the Court of any power to reach emergency legislation on any constitutional ground, he warned, and we are now facing war conditions. Why wait for a crisis to act to vindicate the powers of the Court? he asked. "I do not think that it is going to hold you up to scorn or ridicule or contempt" to adopt this resolution, he concluded. "I think that the considered judgment of the ministers of law, which we lawyers are, is that under our form of government and under our division of powers, the thing is right and our expression of that feeling will neither cause scorn, ridicule or a backyard squabble."

The House then voted on the resolution, and it was carried 92 to 35.

Committee on Civil Service Makes Its Report

Murray Seasongood of Ohio then presented the report of the Committee on Civil Service. He offered the following resolution:

> That giving to all or some civil service employees right to appeal to the courts from adverse declarations of the Civil Service Commission is disapproved.

Mr. Seasongood explained that it is very difficult to get rid of unsuitable civil service employees when they have a right to appeal from dismissal to the courts, and the resolution would place the Association on record as opposed to allowing such appeals.

The resolution was adopted.

The committee's next resolution was in three sections; Mr. Seasongood withdrew the third section in view of a request by the Section of Taxation that they be given an opportunity to study the recommendation. The three parts of the resolution were as follows, only the first two of which were offered to and approved by the House:

> That the following recommendations of the Hoover Commission (Public Law 162, Eightieth Congress) are meritorious and deserving of support:
>
> (a) That the Postmaster General should remain a Cabinet officer appointed by the President and confirmed by the Senate, but should not be an official of a political party,
>
> (b) That the Post Office should be taken out of politics and confirmation of postmasters by the Senate should be abolished, and
>
> (c) That all officials in the Treasury Department below the rank of Assistant Secretary should be appointed from the career service without Senate confirmation, and particularly that collectors of internal revenue and collectors of customs be removed from the patronage field.

The third resolution of the committee was as follows:

> That the preferences in civil service and other government employments accorded veterans and sometimes mem-

bers of veterans' families are too ample. Preferences indicating gratitude and conferring reasonable advantage are approved. But they should not be so sweeping as to interfere with the proper workings of the merit system and cause discouragement of those seeking to enter on or hold their place in a public service career.

Mr. Seasongood explained that veterans applying for positions under federal civil service receive the veteran's preference credit even if they do not obtain a passing mark, and if the preference credit boosts them up to the passing mark, they are automatically catapulted to the very top of the list over persons who may have made much higher marks. In the matter of lay-offs, he explained, veterans also have priority for retention on the job over persons who have tried to make a career in the merit system and who may have far greater seniority than the veteran.

James L. Shepherd, Jr., of Texas said that he thought that the provision recommended by the committee was very vague, and he moved to recommit it to them in the hope that it might be made more specific.

Mr. Seasongood replied that it was very hard to frame particular legislation, since the subject matter deals with various merit systems, federal and state, and that the committee thought that a general statement of opinion would be helpful.

Floyd E. Thompson of Illinois said that he was opposed to referral. The general statement was clear, he declared, and the principle was sound.

W. J. Jameson of Montana said that he favored referral. The recommendation is general, he said, and he thought it surprising to pass such a resolution without knowing what rights of the veterans were intended to be taken from them.

Mr. Seasongood responded that it was not a question of denying the veteran certain advantages—no one is in favor of that, he declared, but if one is in favor of a merit system, one does not want those advantages to be so great as to deprive the Government of the services of men far better qualified for the jobs.

In reply to a question by Ross L. Malone, Jr., of New Mexico Mr. Seasongood said that the Hoover Report had contained recommendations of a similar nature.

The House then voted against referral and to adopt the resolution.

The next resolution offered by Mr. Seasongood's committee was as follows:

> That court personnel should, so far as possible, be recruited and kept under the merit system.

This resolution was adopted without debate.

The committee's last resolution was as follows:

> That the Standing Committee on Scope and Correlation of this Association, recently created, be requested to recommend how the work of this committee particularly, but not exclusively, regarding selection of hearing examiners for various administrative agencies, may be coordinated with the work of Sections and Committees of this Association.

The committee was really attempting to get instructions on this subject, Mr. Seasongood explained; his committee was interested in the matter, but did not wish to take jurisdiction of it unless it was within their scope. The House voted to approve the resolution.

Alfred J. Schweppe Gives Peace and Law Committee Report

Alfred J. Schweppe of Washington, Chairman of the Committee on Peace and Law Through United Nations, then gave the report of that committee.

He offered the following resolution:

> RESOLVED, That the American Bar Association authorizes and instructs its Committee on Peace and Law through United Nations and the Section of International and Comparative Law, conjointly and separately, to study, and bring to the House of Delegates for consideration, suggestions or recommendations of amendments to the Constitution of the United States relating to the treaty-making power and addressed to the following ideas:
>
> (1) That the Constitution shall be amended so as to provide that a treaty shall not become the supreme law of the land upon ratification except to the extent that it shall thereafter be made so by act of Congress;
>
> (2) That the Constitution shall be amended so as to provide that in legislating to give effect to treaties Congress shall make no law not otherwise authorized by the Constitution; and
>
> (3) That the Constitution shall be amended so as to provide that the basic structure of the United States Government as now embodied in the Constitution, the express limitations of the Constitution on the powers of Congress, the guarantees of rights and freedoms contained in the Constitution and the Bill of Rights, and the powers reserved to the states and to the people, shall not be abolished nor altered by any treaty or executive agreement, nor otherwise than by constitutional amendment.

He said that the position of the United States in respect of treaties was unique in that when this nation adopts a treaty, it becomes self-executing and automatically the supreme law of the land under the Constitution. The resolution would authorize a study of the problem, he said, with a view to finding a means of protecting the position of the United States in ratifying treaties. The House voted to adopt the resolution.

The committee's second resolution reads as follows:

> RESOLVED, That the American Bar Association is of the opinion that the Draft International Covenant on Human Rights as prepared at the March-May 1950 session of the United Nations Commission on Human Rights, is not in such form nor of such content as to be suitable for approval and adoption by the General Assembly of the United Nations, or for ratification by the United States of America.

Mr. Schweppe said that the committee's position on this, as expressed in the resolution, seemed to be in accord with that of the Economic and Social Council of the United Nations itself, but that the recommendation had been drawn before the Covenant on Human Rights had been referred to the General Assembly and the Commission on Human Rights for further consideration.

The House voted to adopt the resolution.

Mr. Schweppe's third resolution was as follows:

> RESOLVED, That the American Bar

Association authorizes its Committee on Peace and Law Through United Nations, as occasion arises, to submit to the Congress of the United States, and to committees and members thereof, and to appropriate officers and departments of the United States, and, through the United States Delegation, to the appropriate officials and agencies of the United Nations, any of the foregoing resolutions concerning the treaty-making power of the United States, the Draft International Covenant on Human Rights, and the resolution of the American Bar Association of September 8, 1949, concerning the Genocide Convention, and the views and suggestions of the committee and its members, acting as such only, with reference to each or any of the said resolutions.

Mr. Schweppe explained that this resolution would enable the committee, when requested by government agencies, to confer with those agencies first only upon official resolutions already adopted by the House, and in other particulars to consult with government agencies when requested as an individual committee or as individual committee members without in any way binding the Association.

The House voted to adopt this resolution also.

International Law Section Reports to House

C. W. Tillett of North Carolina then presented the report of the Section of International and Comparative Law. At his request, Harold E. Stassen, of Pennsylvania, presented the Section's first resolution, which read as follows:

RESOLVED, That the following proposed resolution, recommended to the House of Delegates by the Section of International and Comparative Law, be made the subject of a study conjointly and separately, by the Committee on Peace and Law Through United Nations and the Section of International and Comparative Law (with the participation of the Section Committee on the Constitutional Aspects of International Legislation) and report at the next mid-year meeting of the House of Delegates:

(*The Proposed Resolution for mid-year report and action.*)

"Resolved that the American Bar Association considers it desirable that every multipartite agreement to which the United States becomes a party in social and economic areas, such as those involved in the Covenant of Human Rights and in the Genocide Pact contain an article (or be ratified with reservation or understanding) in substance as follows:

"It is expressly stipulated (1) that none of the provisions of this instrument shall be regarded as a part of the domestic law of any of the contracting parties by virtue of the coming into force of this instrument as an international agreement and (2) that the respective constitutional powers of state and federal authorities in federal states shall not be deemed to have been affected in any way by the coming into force of this instrument as an international agreement."

Or as follows:

"It is expressly stipulated (1) that this treaty is not intended to be self-executing nor to become a part of the domestic law of any of the contracting parties unless implemented by domestic legislation, and (2) that federal states are not bound by the treaty to cause their legislative authorities to enact any legislation which they could not constitutionally enact in the absence of the treaty."

He said that the joint studies by the Section and the Committee on Peace and Law Through United Nations had contributed an important milestone in the leadership of the American Bar and its effect upon the position and leadership of the United States in the world. Unless we can find agreement within the American Bar Association, he said, we cannot expect to have any great impact upon the course of the nation. The Section and the committee have come to the conclusion that there should not be a constitutional amendment dealing with the treaty power, he said, for while it is correct that only the United States has a provision in its Constitution that makes a treaty the supreme law of the land, it is also true that we are the only major nation that has forty-eight sovereign states in a federal system, and without something like our present constitutional provision, the treaty-making power of the Federal Government would in effect come to a halt. On the other hand, Mr. Stassen continued, when international treaties affect domestic policy, the treaty clause must not be allowed to take effect so as to change the fundamental structure of the federal system. Either of the two clauses presented above, if inserted in the treaty or if stated as a reservation by the United States would accomplish that purpose, he said.

The House then voted to adopt the recommendation.

Mr. Tillett then presented the following resolution for the Section and it was approved by the House:

RESOLVED, That the American Bar Association recommends the appointment by the President of a governmental committee consisting of representatives of the Department of State, the Department of Justice, the Administrative Office of United States Courts and other interested agencies, for the purpose of drafting treaties and taking such other action as may appear advisable to codify and improve international procedures in civil and criminal matters, especially the practice of procuring evidence abroad, serving judicial documents abroad, and obtaining information on foreign law from foreign official sources; and

That the American Bar Association offers its full cooperation with any governmental committee appointed to codify and improve international procedures in civil and criminal matters.

The Section's third resolution was this:

RESOLVED, If the Canadian Bar Association concur, that the two Associations undertake a joint study and report on the questions of whether and how it would be feasible for like-thinking members of the United Nations, acting within the framework of that organization, to strengthen international arbitral and judicial procedure.

Carl B. Rix of Wisconsin said that as a matter of procedure, he wished to raise the question whether it was wise to instruct Sections to enter into long and extended studies which may involve possible commitment of funds of the Association.

Mr. Tillett said that this was a joint study of the two Associations, not of the Section, if the Association were willing.

The House voted to approve the resolution.

The Section's next resolution moved by Mr. Tillett was as follows:

RESOLVED, That the American Bar

Association

1. Endorses and supports the establishment of a Center for collecting, classifying, indexing, analyzing, publishing and transmitting information concerning the law of Far Eastern nations; and

2. Recommends that the Center be established and maintained by the Library of Congress.

Mr. Tillett explained that while there are numerous collections of Far Eastern law in the United States, there is no one comprehensive center where all the law can be found and referred to. The Section feels that such a center would be of tremendous value, he said.

Secretary Stecher read a resolution of the Committtee on Facilities of the Law Library of Congress to the same effect and in similar form. The House voted to adopt the Section's resolution.

The House then adopted Mr. Tillett's last resolution, as follows, without debate:

RESOLVED, That the American Bar Association recommends that active efforts be continued to develop on a larger scale the so-called Fulbright program and urges that Congress appropriate adequate funds to enable qualified foreign students to come to the United States to carry on studies here, especially in law schools, under the International Information and Educational Exchange Act of 1948, approved January 27, 1948 (Public Law 402, 80th Cong., 2d Sess., 62 Stat. 6).

William M. Wherry of New York, Chairman of the Committee on Lawyers' Reference Service, offered the following resolution, which was adopted without debate:

RESOLVED, That the Lawyer Reference Plan is an essential instrument in making available legal advice and the services of lawyers to the public and that it is concrete evidence of the acceptance by the profession of its social responsibilities; and be it further

RESOLVED, In view of the importance of the foregoing considerations, that the Special Committee on Lawyers' Reference Service of the American Bar Association be continued.

Robert R. Milam of Florida, Chairman of the Committee on Coordination of Bar Activities and Integration of Effort of State and Local Bar Associations with the American Bar Association, then took the floor to report for that committee. He said that the committee had been successful in getting coordination committees appointed in each of the states. It was felt that one of the best methods of effecting coordination was to establish liaison councils. These, he explained, were representatives from the state bar associations to every Section and committee of the American Bar Association in which the state association was interested. This plan has been quite successful, he said, some of the larger state associations sending representatives to nearly all the Sections and committees of the American Bar Association. The two committees in which the state associations seemed most interested, Mr. Milam continued, were professional ethics and grievances and public relations, thus manifesting an enormous interest in that phase of the Association's work.

In closing, Mr. Milam reiterated the point that the basic purpose of the coordination movement was to organize the lawyers of the country from the national level down to the local level so that they might speak with a united voice on issues that imperil our way of living and our system of government by law. He then moved the adoption of the following resolution:

WHEREAS, on November 5, 1949, the Board of Governors of the American Bar Association adopted a resolution creating a Special Committee on Coordination of Bar Activities and Integration of Effort of State and Local Associations with the American Bar Association; and

WHEREAS, since that time that Special Committee has been working diligently in organizing, promoting and carrying out a coordination program and the effort has been well received by State and Local Bar Associations throughout the country; and

WHEREAS, under the coordination program conceived and put into operation by that Special Committee, more than two-thirds of the State Bar Associations of America, as well as many local Bar Associations affiliated with the House of Delegates of the American Bar Association, have, during the past few months, appointed representatives to the Liaison Councils of Sections and Committees of the American Bar Association, and many more of the remaining State and local Bar Associations have already laid plans to make such appointments; and

WHEREAS, Under the encouragement of that Special Committee, several State Bar Associations have been conducting studies of their committee structures with a view toward informing them more nearly of the committee structure of the American Bar Association, as a means of facilitating the processes of coordination, and other State Bar Associations are expected to make similar studies in the near future; and

WHEREAS, it is the sense of the House of Delegates that the promotion of this coordination of effort between the American Bar Association and the other bar associations of this country, in order to achieve the strengthening of the organized bar in America in these critical times is of great importance.

NOW, THEREFORE, BE IT RESOLVED, that this Special Committee should be converted into a Standing Committee of the American Bar Association, to be designated the "Standing Committee on Coordination of the Activities of the American Bar Association with the Activities of State and Local Bar Associations", and that the Rules and Calendar Committee and the Committee on Scope and Correlation are requested to take the necessary steps to effect a proper amendment to the by-laws to that end.

Secretary Stecher said that the Board of Governors had decided to recommend that the committee's resolution be referred to the Committee on Scope and Correlation of Work, and accordingly he moved that such referral be made a substitute for the pending motion put by Mr. Milam.

Mr. Milam said that the Committee on Scope and Correlation had already approved making his committee a standing committee.

The House then voted to reject the substitute motion and to adopt Mr. Milam's motion.

Henry S. Drinker of Pennsylvania, Chairman of the Committee on Professional Ethics and Grievances, moved the adoption of the following resolution to amend Canon 28 of the Canons of Judicial Ethics:

That Judicial Canon 28 be amended by adding to the second paragraph thereof the following:

Where, however, it is necessary for

judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from participating in partisan politics to the extent of attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.

Whitney North Seymour of New York said that he questioned the limitation imposed upon judicial candidates which would restrict them to speaking only on behalf of their own candidacy. In the states where there is a political campaign, he said, he supposed that it was proper for the judge to appear and speak in behalf of the party of which he was a candidate. He moved to eliminate the words "in behalf of his own candidacy".

Mr. Drinker said that his committee would accept the amendment and it was carried by a vote of 47 to 33.

Secretary Stecher said that the Board of Governors had a further recommendation to submit to the House on the same subject—the Board recommends that the committee give consideration to the formulation of a canon dealing with a similar situation in the Canons of Professional Ethics applying to a lawyer running for the office of judge for the first time, he said.

Osmer C. Fitts of Vermont suggested the omission of the words "for the first time" from the Secretary's motion, so as to make the motion apply to a canon dealing with lawyers running for judicial office. Mr. Stecher accepted the suggestion, and the House moved to request the committee to consider formulation of such a canon.

Mr. Drinker said that the only other matter on which his committee wished to report was a proposal by the Patent Section to amend Canon 27 of the Professional Ethics Canons so as to provide for permission to patent lawyers and admiralty lawyers to state their specialty on their letterheads. Mr. Drinker said that his committee did not favor such an amendment, but that he thought it would be advisable for the House to consider the question of such an amendment as well as a change in Canon 46 relating to specialties.

Albert R. Teare of Ohio, Chairman of the Section of Patent, Trade-Mark and Copyright Law, reported for that Section. His report was a continuation of the discussion of Canon 27. He proposed an amendment to Canon 27 as follows:

It is not unprofessional for a lawyer who devotes substantially his entire time to the practice of a recognized legal specialty to designate such specialty on his letterhead or shingle. Recognized legal specialties include but are not necessarily limited to admiralty, patent, trade-mark and copyright law.

Chairman Morford said that he had received the proposed amendment from a nonmember of the House, and that he had referred the matter to the Committee on Hearings. He then called upon Donald A. Finkbeiner of Ohio to report on the question for that committee.

Mr. Finkbeiner said that his committee had held hearings on the proposed amendment to the Canon, and had the following recommendations:

1. That in view of the last paragraph of Opinion 277 and of Opinion 281 (the professional ethics opinions that had held designation of specialties on letterheads to be unethical) an amendment of Canon 27 is desirable.

2. That Opinion 281 be not published and that the operation of opinion 281 and the last paragraph of Opinion 277 be suspended pending further action by the House.

3. That a special committee of the Association be appointed to investigate and study the matter of an amendment to Canon 27.

Mr. Finkbeiner moved adoption of these recommendations as a substitute for Mr. Teare's motion to adopt the Patent Section's amendment to the Canon. Both Mr. Teare and Mr. Drinker acquiesced in this substitute.

Douglas Hudson of Kansas said that he thought that the amendment was very worthy and that he was in favor of it.

The House voted to adopt the recommendations of Mr. Finkbeiner's committee.

The second item in the report of the Patent Section was a recommendation for an amendment of the Rules of Practice of the Patent Office as follows:

That the Association favors a rule of practice in the United States Patent Office which would empower the Commissioner of Patents to forbid as unprofessional conduct the use of display advertising, circulars, letters, cards or other material to solicit patent business directly or indirectly, and to refuse recognition to practice before the Patent Office or to suspend or to exclude from further practice any person engaging in such solicitation or associated with or employed by others who so solicit, and that the Secretary of the Association be authorized to communicate with the Secretary of Commerce and the Commissioner of Patents the action of the Association in adopting this recommendation.

Mr. Teare moved the adoption of this resolution by the House. Osmer C. Fitts of Vermont inquired whether this would have any effect on the listings in Martindale-Hubbell. Mr. Teare replied that Martindale-Hubbell was a law list, and was not an example of the type of display advertising referred to in the resolution.

The House voted to adopt the resolution.

On motion of Secretary Stecher, the House then recessed.

FOURTH SESSION

■ During this session, the House adopted a resolution approving endorsement of continuing long-range Association activity in the fields of American citizenship, legal aid and lawyers' reference service and a resolution urging state associations to study the possibility of setting up the "Missouri Plan" for judicial selection in their states. Eight proposals for changes in the Internal Revenue Code offered by the Section of Taxation were approved, and the House debated the possibility of extension of the antitrust laws to apply to labor unions in certain cases.

■ This session convened at 9:45 A.M. Thursday, September 21.

Chairman Morford reported that the President of the Association had appointed the committee to investigate the proposal to purchase Salisbury House at Des Moines, Iowa, for a Headquarters building for the Association. Howard L. Barkdull of Ohio, William J. Jameson of Montana, A. M. Mull, Jr., of California, Robert F. Maguire of Oregon, Ross L. Malone of New Mexico, Edward L. Wright of Arkansas, Phil Stone of Mississippi, Whitney North Seymour of New York, Henry C. Hart of Rhode Island, Robert R. Milam of Florida, Jacob M. Lashly of Missouri and James R. Morford of Delaware were appointed to the committee from the House, together with the entire Board of Governors, appointed as a committee of the whole.

Orison S. Marden, of New York, Chairman of the Committee on Legal Aid Work, reported for that committee. He said that the Bar Association of Hawaii had adopted resolutions creating a Legal Aid Society and the Lawyers' Reference Plan for the islands. He said that the number of legal aid units in the United States had increased over 60 per cent in the four and one half years since his committee had begun nationwide promotional work. There are still fifty cities of 100,000 or more which do not have organized legal aid, however, he said, and the support of every influential member of the organized Bar is needed.

William F. Riley Reports on Public Relations

William F. Riley, of Iowa, gave the report of the Committee on Public Relations, of which he is chairman. He told what the committee had been doing through the year, mentioning the National Conference of Bar Association Presidents and the Committee on Coordination of Bar Association Activities as part of the Association's activities in the public relations field. He said that the conference committees representing the different communications media, authorized by the House at its February meeting, had been appointed, and that they intended to request the communications media to appoint similar conference committees, the objective being to obtain a better portrayal of the administration of justice, of the courts and of the place of the lawyer in society on the screen, the stage, the radio and television.

W. J. Jameson, of Montana, reported for the Committee on Scope and Correlation of Work. Three resolutions recommended by the committee were adopted the day before, he told the House (see page 952), and he moved adoption of the committee's fourth and final recommendation:

> RESOLVED, That the American Bar Association endorse and emphasize, as a part of its continuing long-range program, activities in the fields of (1) American citizenship and (2) legal aid and (3) lawyers' reference service.

He said that, of necessity, during the last year and a half, the committee had devoted most of its attention to the matter of correlation and to recommending the definition of functions of various organizations within the Association. The second phase of the committee's work falls into two categories, he said: first, the matter of internal organization and second, recommendations with respect to substantive work in the long-range continuing program of the Association. The committee is now turning to this second aspect of its field, he said. The House then voted to adopt the resolution.

William L. Marbury, of Maryland, Chairman of the Special Committee on Legal Aspects of National Security, reported for it. He said that the members of the committee were unanimous in the view that the committee in its present form should not be continued. "Legal aspects of national security" is a very vague and broad term, he said, and might cover much important legislation. A committee of nine or ten members scattered all over the United States cannot possibly cover so broad a field as the name of the committee suggests, he said, especially since the legislation with which it would be concerned would be of an emergency nature. He therefore moved to abolish the special committee with a recommendation to the Board of Governors that it investigate the problem of how the organized Bar should deal with the legal aspects of national security through an appropriate agency of the Association.

Mr. Seymour, of New York, suggested that it would be better to refer the matter to the Committee on Scope and Correlation, without abolishing the committee for the present at least. Mr. Marbury said that he had always understood that it was practically impossible to abolish a committee and that he accepted the substitute. The House voted to refer the question to the Committee on Scope and Correlation.

Military Justice Committee Reports on New Military Code

George A. Spiegelberg, of New York, Chairman of the Committee on Military Justice, reported for that committee. He reported that the Uniform Code of Military Justice had been enacted into law and would be effective May 31, 1951. Despite the best efforts of his committee, he said, Congress had not included the Association-endorsed proposal to eliminate courts martial from the control of commanding officers. The committee regard this an essential, he declared, but the Uniform Code is still a great step forward. He said that it creates a court of military appeals,

composed of civilians, equated with the United States Courts of Appeals. This court is charged with the duty of continuing observance of the Code in operation, he continued, and of reporting annually to Congress on any needed changes or reforms which may be required to improve military justice. The committee hopes that this provision for further changes in the code may lead to divorce of courts martial from command, he said. He moved the adoption of a resolution continuing the committee so that it could work for the appointment of qualified judges to the Court of Military Appeals.

The appointment of qualified men to the military appeal court is of great importance, he said. The House voted to adopt the resolution.

House Hears Report on "Missouri Plan"

Morris B. Mitchell, of Minnesota, gave the report of the Committee on Judicial Selection, Tenure and Compensation. He said that nineteen state bar associations now have active committees working for the adoption of the so-called "Missouri Plan" for selection of judges from a list prepared by a nonpartisan committee. He said that the committee intends to make a survey of the judicial retirement features and of the salaries of judges in the various states. Adequate judicial salaries must go hand in hand with the campaign to obtain adoption of the Missouri plan, he said, for in many states judges' salaries are so low that it is impossible to get good lawyers to accept appointment to the Bench, and many able judges are resigning because they cannot live on their present salaries.

He moved the adoption of the following resolution:

> RESOLVED, That the House of Delegates recommends that in each state where judges are elected by direct vote of the electorate, the state bar association appoint a committee to consider and report on the applicability to that state of the American Bar Association Plan for Selection and Tenure of Judges, or possible variations thereof.

Charles M. Lyman, of Connecticut, offered the following as a substitute for the committee's resolution:

> RESOLVED, That the House of Delegates of the American Bar Association recommends that each state bar association (other than Missouri) appoint a committee to consider and report on the applicability to its own state of the American Bar Association plan for selection and tenure of judges or possible variations thereof. This recommendation is intended to apply whether the judges in a particular state are elected by direct vote of the electorate or are appointed (whether subject to confirmation or not) according to the uncontrolled will of a single individual.

Mr. Lyman said that the purpose of the Association's plan was to eliminate political considerations from the appointment of judges insofar as possible. There is no reason for restricting the attempt to get the Missouri plan adopted in states which have an elected judiciary, he said, for in states where the judges are appointed, they are frequently appointed for political reasons.

Mr. Mitchell said that his committee had considered Mr. Lyman's suggestion and had no objection to his substitute resolution.

John T. Barker, of Missouri, said that in Missouri the Republican governors had appointed all Republican judges from the list recommended by the nonpartisan committee and the Democratic governors appointed all Democratic judges from the list. While the Missouri courts are very fine, he went on, their members are still political appointments of the Governor in office. The people of Missouri like this, he said, because they believe that a judicial cloak of sanctity thrown about a man does not make him lose his political beliefs. The only criticism that he has of the plan in Missouri, he said, is that perhaps the Chief Justice should not be a member of the nonpartisan committee that recommends men qualified for the Bench. His views may greatly influence laymen, he said, and this may mean that the Court is selecting its own successors.

The House then voted to adopt Mr. Lyman's substitute resolution, and, on Mr. Mitchell's motion, voted to continue the Committee on Judicial Selection and Tenure.

Admiralty Committee Proposes Change in Law

Arnold W. Knauth, of New York, presented the report of the Committee on Admiralty and Maritime Law. He moved the adoption of the following resolution:

> That the committee be authorized to take such action as it deems feasible to have enacted into law an act amending subsection K of the Ship Mortgage Act, 1920 (41 Stat. 1003 and 46 U.S. Code 951), by adding at the end thereof the following provision:
>
> "Foreign ship mortgages. As used in sections 951, 952, 953 and 954 of this title, the term 'preferred mortgage' shall include, in addition to a preferred mortgage made pursuant to the provisions of this title, any mortgage, hypothecation or similar charge created as security upon any documented foreign vessel (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than 200 gross tons) if such mortgage, hypothecation or similar charge has been duly and validly executed in accordance with the laws of the foreign nation under the laws of which the vessel is documented and has been duly registered in accordance with such laws in a public register either at the port of registry of the vessel or at a central office or elsewhere if the laws of the foreign nation under the laws of which the vessel is documented so provide; and the term 'preferred mortgage lien' shall also include the lien of such mortgage, hypothecation or similar charge."

Mr. Knauth explained that under the present law, American ships sold to foreign flags on mortgage cannot be foreclosed in American courts, the rule being that a mortgage on a foreign-flag ship is a matter for the courts of the country of the ship's registry. There is no reason for such a situation, he said, and S. 3990, now before the Congress, would remedy it. No one is against the proposal, he added. He said that S. 3990 contained a further improvement not in the committee's original resolution, and he added it to the original resolution by the following language: "PROVIDED, However, that such 'preferred mortgage lien' in the case of a foreign vessel shall also be subordinate to maritime liens for repairs,

supplies, towage, use of drydock or marine railway, or other necessaries." All Continental nations have similar provisions in their law, he explained, and this provision favors our repairmen. It merely brings American law into harmony with the law of other nations, he said.

The House voted to adopt the resolution of the committee with the proviso added.

Secretary Stecher then reported that the following had been named Assembly Delegates for terms expiring at the adjournment of the 1953 Annual Meeting: Hatton W. Sumners of Texas, Charles Ruzicka of Maryland, James D. Fellers of Oklahoma, W. J. Jameson of Montana and Robert T. Barton, Jr., of Virginia.

Paul W. Alexander, of Ohio, then gave the report of the Committee on Divorce and Marriage Laws and Family Courts. He said that the Interprofessional Commission on Marriage and Divorce Laws had just been incorporated in the District of Columbia as a nonprofit educational organization. It consists of fourteen members, three of whom are lawyers, Judge Alexander said, and it proposes to lessen the confusion in our present divorce laws through the preparation of a model uniform act or series of acts for submission to the various legislatures.

On Judge Alexander's motion, the House voted to continue the Special Committee. The resolution was as follows:

> That the committee be continued primarily to serve as liaison body between the interprofessional commission and its collaborating groups, and the ABA.

Section of Taxation Proposes Eight Changes in Tax Law

H. Cecil Kilpatrick, of the District of Columbia, reported for the Section of Taxation, of which he is the Chairman. He said that since the creation of the Section eleven years ago it has made over one hundred recommendations for improvements in our tax structure and that a substantial number of these have become law. He declared that the Section had embodied the rest of its recommendations in a single bill during the last year, and that this bill is now before the Congress under the name "Revenue Revision Bill of 1950". The Korean War has prevented consideration of the bill to date, he said, but it is expected that it will be given a preferred position in the next Congress. He then presented eight resolutions for the approval of the House. These dealt with technical changes in the Internal Revenue Code, and are too long for publication here. They may be summarized as follows:

(1) A proposal to allow the Collector to require withholding from a federal employee's wages delinquent taxes assessed against him. This would put federal employees on the same basis as employees of private industry.

(2) A recommendation that the federal statute of limitations for violation of the Revenue Law be tolled only when the taxpayer is actually beyond the jurisdiction of the United States courts. Presently, the statute is tolled when the defendant is absent from the judicial district in which he resides, and this may be entirely different from the district in which he files his return. This means that there is no effective statute of limitations in such cases.

(3) A rule allowing a deduction for payments to private voluntary disability benefit programs for employees. Some states require contribution either to state disability funds or to private funds. The Bureau of Internal Revenue presently holds that if the employer elects the private fund in such cases, the payments are not deductible, whereas payments to state funds are deductible.

(4) A change in the Code so as to permit taxpayers to elect whether to treat industrial and commercial research and development expenses as capital items or expenses. The present regulations indicate that such expenditures must generally be capitalized and recovered by depreciation allowances if the taxpayer can show that the intangible business asset has a useful life in the production of business income for a reasonably definite limited period.

(5) This change is best illustrated by an example. Corporation *A* wants to buy the plant of Corporation *B*. Corporation *B* has been in business a long time and has written off a large part of the cost of that plant through depreciation. If it sells the plant, it has a large taxable profit, and so the stockholders of Corporation *B* prefer to sell the stock for its present value. The Commissioner holds that if Corporation *A* acquires the stock and then dissolves *B* and takes over its assets, it must also use the basis of the old corporation for the assets, although what it is really doing is spending its money for the assets, not the stock. The proposed change would set up a mechanism whereby, in such a situation, the purchasing corporation might receive as the basis for the assets the cost paid for the stock instead of the original cost of the assets. To prevent tax avoidance, the dissolution of the old company would have to take place within six months after the acquisition of its stock, under the Section's proposed statute.

(6) A change relating to deductions by farmers for amounts spent for soil and water conservation improvements to their land. At present, a farmer is required to capitalize certain expenses of conservation. Thus, if he uses his tractor for plowing his cornfield in the morning and for soil conservation in the afternoon, theoretically he must keep records to show how much time he spent at each activity so that he can determine how much depreciation he will be allowed for the time spent in soil conservation work. The Section's recommendation would permit the farmer to make an election: he could keep records as under the present law, or he could claim a deduction.

(7) A change growing out of the difficulty of determining the proper year for taking an allowable deduction. Under the present law, if the taxpayer claims a deduction for 1946, the Commissioner disallows it and the taxpayer litigates the question,

the statute of limitations may have run by the time the litigation has been concluded. If the taxpayer finds that he was not entitled to the deduction in 1946 but that it was allowable for 1947, he has lost his right to the deduction for 1947 because the statute has run. The Section's proposal would eliminate this hardship caused by an honest mistake as to the proper year by allowing the taxpayer to claim the deduction for 1947 even though the statute has run by the time he has learned the proper year, provided claims for 1947 were not barred at the time the litigation was begun. The change would give the Commissioner a similar right to collect the tax for the right year, if the statute had not run when he asserted that there was tax liability for what turned out to be the wrong year.

(8) A change in the existing law permitting the executor of an estate to obtain release from liability, after distribution of the estate, for a deficiency resulting from fraudulent understatement of income by the deceased. At present there is no statute of limitations on collection of taxes fraudulently underestimated. This means that the executor, with no knowledge of the fraud, may be held liable for the taxes after the estate has been distributed. The proposed change would allow the executor to request release from liability and set up a short limitations period during which the Commissioner could initiate proceedings so that revenue would not be lost.

The House voted to approve the Section's resolutions on all these changes.

Kenneth C. Royall Reports on Legal Problems of ECA

The next business taken up by the House was the report of the Committee on Business and Legal Problems in Occupied and ECA Countries, given by the committee chairman, Kenneth C. Royall, of New York.

Mr. Royall said that his committee was making studies of the legal problems facing the American businessman in his activities in occupied and ECA countries. Brief outlines have been made of some of the more important laws and regulations that affect American business in various nations, he said. It is hoped that in summarizing the situation in the various nations, the deterrents and hindrances to American business in the countries will be pointed up.

On motion of Mr. Royall, the House voted to continue the committee, and to enlarge its membership to seven.

Labor Law Section Reports Work on Taft-Hartley Changes

Theodore R. Iserman, of New York, Chairman of the Section of Labor Law, then presented that Section's report. He called the attention of the members of the House to four resolutions passed by the Section which approved amendments to the Taft-Hartley Act sponsored by Senator Taft. He was not offering these resolutions to the House, he said, because the proposed amendments to the Labor Management Relations Act were not going to be considered at the present session of Congress, and he felt that it was not desirable for the Association to take any action now.

On motion of Albert E. Jenner, Jr., of Illinois, the House made the report of the Committee on Commerce a special order of business and Edward R. Johnston, of Illinois, took the floor to speak for the committee.

He said that about a year ago the Board of Governors had referred to his committee and to the Section of Corporation, Banking and Business Law and the Section of Labor Law jointly the question of whether or not the antitrust laws should be extended to cover the activities of labor unions. His committee had given a great deal of study to the problem, he said; since labor unions are by nature a monopoly, the antitrust laws cannot be generally applied to them. The question is where to draw the line, he continued, and after careful consideration, his committee had prepared definitive legislation, drawing the line at the point where the activities of labor organizations so vitally affect the public interest as to cause grave danger to the national economy, the national health or the national safety. The bill drawn by the committee, he said, had been sent to the Section of Corporation, Banking and Business Law and the Section of Labor Law, neither of which has acted favorably upon it. His committee feel, he went on, that if they are to attempt to frame legislation along these lines, they should have an expression from the House as to whether it agrees with the general principle upon which the committee are proceeding. Accordingly, he moved that the following be adopted:

> WHEREAS, The question of the extent to which labor unions should be subjected to the coverage of the antitrust laws was referred by resolution of the Board of Governors to the Sections of Corporation, Banking and Business Law and Labor Law and the Standing Committee on Commerce, and
>
> WHEREAS, The Standing Committee on Commerce has prepared and submitted to the Sections of Corporation, Banking and Business Law and Labor Law a draft of proposed Congressional Legislation subjecting labor unions to existing antitrust laws insofar as the activities of labor organizations jeopardize the national economy, health or safety but such draft has not as yet met with the full approval of the foregoing Sections. Now therefore be it
>
> RESOLVED, That the American Bar Association favors the adoption of legislation subjecting labor unions to existing antitrust laws insofar as the activities of labor organizations jeopardize the national economy, health or safety, and to that end the Sections of Corporation Banking and Business Law and Labor Law and the Standing Committee on Commerce are directed to prepare for presentation to the House of Delegates at its mid-winter meeting appropriate legislation to effectuate the principle approved by this resolution.

Mr. Maguire, of Oregon, rose to a point of order, saying that the Rules of the House forbade a report of this kind unless it was accompanied by a draft of the proposed legislation. Chairman Morford said that the point was not sustained because the

resolution offered was merely an announcement of principle for the guidance of the interested bodies, who are then to draft the legislation.

John M. Niehaus, of Illinois, said that the Labor Section had not acted upon the matter referred to them by the Board of Governors, because some of the members of the Labor Section Council were strongly opposed to this type of legislation.

Mr. Johnston said that he was not certain that it had been wise to have the matter referred to three bodies, since it was extremely difficult to get anywhere in the framing of legislation with so many divergent groups to deal with.

William A. Sutherland, of the District of Columbia, said that he wondered if the committee intended to limit its resolution to the question whether the antitrust laws should be extended to cover the problem. It seemed to him, he said, that other remedies might be much better.

Mr. Johnston replied that he thought that the antitrust laws as they stand today could be very effectively used in those cases where exercise of labor's monopoly power imperils the national health, economy or safety.

House Debates Question of Amending Resolution

Mr. Seymour, of New York, said that he thought that the House should recognize the need for some regulation without prejudging the question whether it ought to be by use of the antitrust laws. Accordingly, he moved to substitute the phrase "regulation" for the phrase "existing antitrust laws" in the committee's resolution.

Charles H. Woods, of Arizona, inquired whether the committee could not prepare the proposed legislation and submit it to the House without first submitting it to the two Sections.

Mr. Johnston replied that his committee could do so, but that the resolution of the Board of Governor's had referred the question to all three groups. He said that he had no objections to Mr. Seymour's amendment, but that he wanted to point out that the change carried the functions of the committee considerably beyond those suggested in the Board of Governors' resolution.

Mr. Maguire said that he thought that if the matter needed attention, it should be referred to one body for action and report, and he moved that the words "Section of Corporation, Banking and Business Law and Section of Labor Law" be stricken from the resolution.

Sylvester C. Smith, Jr., of New Jersey, said that he opposed that motion. The House ought to have the views of the Labor Section, and the views of the Corporation Section, he said, for amendment of the antitrust laws is a very serious thing.

Karl C. Williams, of Illinois, suggested that the matter might be handled by referral to the three bodies for a combined report if possible.

Mr. Maguire said that on further thought he agreed with Mr. Smith, and withdrew his motion.

The House then voted to adopt the resolution along with the Seymour amendment.

W. Carloss Morris, Jr., of Texas, then reported for the Junior Bar Conference. He said that some eight new state junior bar groups had become affiliated with the Junior Bar Conference during the year, and that the Conference's public relations program was at high tide. He said that the American Law Student Association now had organizations at some seventy law schools throughout the country, and that it was doing fine work. The Conference has also obtained 1580 new members during the year, he said, compared with 840 for the same period last year. The Conference is working on the problem of lawyers being called to active duty with the Armed Forces without sufficient time given them to wind up their affairs and the affairs of their clients before they must report.

Richard Bentley, of Illinois, reporting for the Section of Legal Education and Admissions to the Bar, said that the Section recommended provisional approval of the Law School of the University of Houston (Texas) and of the Law School of the University of Tulsa (Oklahoma). Upon his motion, the House voted to approve the resolutions conferring approval on the two schools.

The House then recessed at 11:55 A.M.

FIFTH SESSION

■ At this session, the House voted to adopt the "Minimum Standards of Judicial Administration" as a pattern for the improvement of judicial administration in all courts of the land. There was debate on legislation pending in Congress relating to the selection of jurors for federal courts, and a resolution was finally adopted calling for a reference of the subject matter to the Committee on Jurisprudence and Law Reform. A proposal by the Criminal Law Section approving the principle of an international criminal tribunal was referred to the Committee on Peace and Law Through United Nations and to the Section of International Law.

■ The House of Delegates convened for this session at 2:00 P.M. Thursday, September 21.

William H. Dillon, of Illinois, gave the report of the Section of Real Property, Probate and Trust Law. He said that for some years the Advisory Committee of the Supreme Court on Rules of Civil Procedure in the Federal District Courts of the United States has been working on a rule to govern condemnation proceedings in the federal district courts. This rule will become Rule 71A of the Federal Rules of Civil Procedure when it is adopted. The Advisory Committee has prepared a number of drafts of the rule, he said, and each of these drafts has been considered by the Section, and the Section has now given its approval to the rule. He proposed the following resolution:

BE IT RESOLVED, That the Ameri-

can Bar Association approves the "Proposed Rule To Govern Condemnation Cases in the United States District Courts" as prepared by the Advisory Committee on Rules for Civil Procedure and shown in its Supplementary Report of June, 1950, and that copies of this resolution be forwarded by the Officers of the American Bar Association to the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States, and to the Advisory Committee on Rules of Civil Procedure.

As originally prepared by the Section, this resolution contained a second paragraph expressing the thanks and congratulations of the American Bar Association to the advisory committee for its work in drafting the rule. On request of George Maurice Morris of the District of Columbia the two paragraphs were considered separately by the House.

Albert E. Jenner, Jr., of Illinois, said that the draft of the proposed rule was the solution of a difficult problem and that he strongly recommended approval of the first portion of the Section's resolution.

The House voted to adopt the first paragraph of the resolution without further debate.

Mr. Morris said that it was not the custom of the American Bar Association to thank any committee or agency of the Association for work well done. While the Advisory Committee is not a committee of the Association, he said he thought that it would be unfortunate to single out one accomplishment of the Advisory Committee and extend to it by formal resolution the Association's appreciation. He was sure that all the members of the House were in accord that the Committee had labored hard and had done its work well, he said, but he thought that the paragraph should be tabled, and he so moved. The House voted to table the paragraph.

Mr. Jenner then said that Mr. Dillon was willing to withdraw the paragraph if that could be done under parliamentary law, and he suggested that that would be the better procedure. He agreed, he said, that a very excellent job had been done. The Chairman of the House then ordered the second paragraph of the resolution withdrawn and the action taken on it deleted.

Section of Criminal Law Proposes Three Resolutions

The next item on the calendar was the report of the Section of Criminal Law, given by John R. Snively of Illinois. He said that the Section had conducted a wide variety of activities during the year, including a study and consideration of the criminal law aspects of aviation. international law, motion pictures, radio broadcasting and comic strips in relation to the administration of criminal justice, and the continuation of the traffic conferences for judges and prosecutors. The awards of merit to cities showing the greatest improvement in traffic courts has brought the work of the Association to the police departments throughout the United States, he said.

He then moved the adoption of the following resolution:

> RESOLVED, That the American Bar Association urges the revision of the present statute by the Congress of the United States so that the jurisdiction relative to crimes committed aboard surface vessels be extended to include crimes committed aboard aircraft operating over the land and waters over which the United States can exercise jurisdiction.

Mr. Snively explained that a recent case in the District Court for the Eastern District of New York had held the defendant guilty of "striking, wounding and beating and simple assault" of persons aboard a United States aircraft in flight over the high seas, but the judgment was arrested for lack of jurisdiction because the federal criminal statutes cover only such acts when committed aboard a United States registered ship on the high seas. The resolution urges a remedy for this lack of jurisdiction, he said.

The House voted to adopt the resolution without debate.

Mr. Snively's second resolution was as follows:

> RESOLVED, That the American Bar Association urges the enactment of legislation by the Congress of the United States that makes it a crime for any person to sabotage or attempt to sabotage an aircraft.

The present federal criminal statutes, Mr. Snively explained, have no adequate provision to cover sabotage or attempted sabotage of an airplane if committed outside the jurisdiction of a state.

The House voted to adopt the resolution.

Mr. Snively then called the attention of the members of the House to a report of the International Law Commission to the General Assembly of the United Nations that declares it to be both desirable and possible to establish an international judicial organ for the trial of persons charged with crimes under international conventions. The International Law Commission voted seven to two for the establishment of an international court, he said, and he then proposed a resolution that would have put the Association on record as expressing commendation to the Commission for its action and recommending that the General Assembly consider the appointment of a committee to study the establishment of an international criminal court system. The resolution would have further pledged the assistance of the Association to the General Assembly in the matter and would have recommended that the first jurisdiction to be conferred by the proposed treaties upon an international criminal court be jurisdiction over the international crime of armed aggression "with a view to criminal prosecution of the individuals who ordered or caused the aggressive and murderous armed attacks without warning or provocation upon the people and territory of the Republic of Korea on and about June 25, 1950".

Tracy E. Griffin, of Washington and Charles S. Rhyne, of the District of Columbia, moved that the resolution be referred to the Committee on Peace and Law Through United Nations and the Section of International and Comparative Law.

Mr. Snively said that he thought that the Section of Criminal Law

should be included in the motion to refer.

The House then voted to adopt the motion of Mr. Griffin and Mr. Rhyne and the resolution was referred to the two bodies proposed by them.

Frank C. Olive, of Indiana, reported briefly for the Section of Corporation, Banking and Business Law. He said that the Council of the Section had approved several resolutions, but that none required immediate consideration and would be deferred to the February meeting.

Judge Murrah Reports for Judicial Administration Section

Alfred P. Murrah, of Oklahoma, then reported for the Section of Judicial Administration. He moved the adoption of two resolutions offered by the Section. The first of these, which was adopted by the House, was as follows:

BE IT RESOLVED THAT:

WHEREAS, in 1938, the Honorable John J. Parker, then Chairman of the Section of Judicial Administration of this Association, appointed seven committees of distinguished lawyers, judges and teachers, to study and report on ways and means of improving the administration of justice through better courts administration, the use of pre-trial, greater efficiency in trial practice, improvement of the jury system, the law of evidence, appellate practice, and the control of administrative agencies.

And, whereas, these reports and recommendations were adopted by the House of Delegates in 1938, and their advocacy made a special program of the Association.

And, whereas, to effectuate these policies, a special committee of the Association on improving the administration of justice was created, and the Honorable John J. Parker became its Chairman.

And, whereas, for ten years, this Association Committee, under the leadership of Judge Parker, acting through its state committees, advocated and worked for the adoption of these proposals as minimum standards for the administration of justice.

And, whereas, many of these specific proposals were considered in each of the states; some have been adopted, and others are currently under consideration or are being progressively promoted.

And, whereas, in 1948, the House of Delegates adopted the joint recommendation of the Judicial Section and the Special Committee that the work of the Committee and the Section be consolidated, and that the Section assume the functions of the Committee. And, whereas, in that year, the Section of Judicial Administration compiled and edited a handbook on the administration of justice, embodying the proposals of the seven committees, and through its state committees, under the directorship of Mr. Paul DeWitt, has continued to advocate the adoption of these minimum standards in the various states.

And now, whereas, Chief Justice Arthur T. Vanderbilt has, with the aid and assistance of the Junior Bar Conference, and under the auspices of the National Conference of Judicial Councils, compiled, edited and published "Minimum Standards of Judicial Administration", based upon a survey and study of the most efficient methods of practice and procedure now employed in the various states.

And, whereas, the Section of Judicial Administration has approved and recommended these standards to the bench and bar as an expansion of its program, and as a charter for the administration of justice in the courts of the United States.

Now, therefore, be it resolved that the American Bar Association, duly assembled, adopts these recommendations of the Section as a pattern for the improvement of the administration of justice in all of the courts of the land, and pledges its support by every appropriate means, consistent with the idea that each state is the first and best judge of the efficiency of its own jurisprudence. To that end, the Association memorializes the organized bar of each state to reexamine its judicial structure in the light of these standards, and to undertake such portion of the program as it deems best suited to its needs and capacities. To effectuate these objectives, this Association recommends that each state bar association create a special committee on improving the administration of justice, charged with the duty of vitalizing its adopted program, and that such committees integrate their efforts with those of the presently constituted state committees of the Section of Judicial Administration of this Association, insofar as it is practical and feasible to do so.

Now, therefore, be it resolved that the Section of Judicial Administration is authorized and directed to cooperate with the organized bar of each state, the Conference of Chief Justices, the Conference of State Bar Presidents, the American Law Institute, the National Conference of Judicial Councils, the Junior Bar Conference, the American Judicature Society, the Section of Bar Activities, and all other like-minded organizations, in the promotion and encouragement of institutes, clinics, demonstrations and other appropriate activities, purposed to stimulate interest in, and establish minimum standards for the administration of justice in the courts of the land.

AND, the Association Committee on Coordination is authorized and directed to exert its best efforts toward the coordination of all bar activities in one concerted movement in the cause of liberty under law through the improvement of the processes of the administration of justice.

The House voted to adopt the resolution as read by Judge Murrah.

House Debates Stand on Jury Bill

Judge Murrah then moved that the House adopt another resolution that concerned H.R. 2050, relating to the selection of jurors for federal courts and providing for jury commissioners.

Judge Murrah said that the Committee on Jurisprudence and Law Reform and his Section were in conflict about this bill. It was the product of much study by the National Judiciary Council, and that that council has recommended the bill to the Congress as machinery for the selection of jurors in federal courts, particularly in metropolitan areas where it has become a very large job. The House was not being asked to support the bill, he said, the resolution merely calling for its referral to the Committee on Jurisprudence and Law Reform for further study.

Chairman Morford inquired whether the words in the second paragraph of the resolution did not in effect give the Association's approval to the bill. This paragraph read: "RESOLVED, That the American Bar Association, duly assembled, adopts the recommendation of the Section of Judicial Administration and hereby approves House Bill 2050 of the 81st Congress. . . ."

Judge Murrah said that his interpretation of the resolution was that

it did not call upon the House to approve the bill.

John T. Barker, of Missouri, said that he thought the language of the resolution did convey the approval of the Association to the bill. He said that the bill set up a new method for the selection of federal jurors, setting up a jury commission with power to interview prospective jurors in their homes and that if the jurors did not want to discuss their private affairs with the commissioners, they could be cited into the federal court and sent to jail for contempt. There has never been anything like that in American jurisprudence before, he declared. He did not believe that the Association should approve a bill which would allow the going into private homes of individuals to find out what kind of jurors they would make, he said.

Mr. Jenner, of Illinois, moved that the first two paragraphs of the resolution be deleted, and the third paragraph be amended so that it would read as follows:

> Resolved, That the American Bar Association rerefers the question of selection and qualifications of federal jurors to the Committee on Jurisprudence and Law Reform for further study and report.

Judge Murrah accepted the amendment, and the resolution was adopted in its amended form.

Association Membership Is Highest in History

Walter M. Bastian, of the District of Columbia, then reported for the Committee on Membership. He said that eighteen members had been elected by the Board of Governors just before the Annual Meeting so that the membership was an even 43,000, the largest in the Association's history. He expects that next year, the membership will be even larger, he declared.

John D. Randall of Iowa, Chairman of the Committee on Unauthorized Practice of the Law, reported for the committee. He said that the 1951 edition of the Martindale-Hubbell Law Directory will contain reprints of various national statements of policy or agreements with lay organizations. The committee is having more and more success, he said, in having trust companies publicize the work of lawyers. The committee was disappointed, he reported, that the Administrative Practitioners Bill had not been called up on the floor of the House of Representatives. The committee feel that that Bill is even more important now that we are going into a period of emergency conditions, he said, and that they intended to increase their efforts to secure passage of the bill.

Milton J. Blake, of Colorado, then reported for the Committee on Legal Service to the Armed Forces. His committee was well prepared to meet the war in Korea, he said, and the state and local associations were cooperating in the work of rewriting the compendium. In reply to a question by John Kirkland Clark, of New York, Mr. Blake said that the pamphlet explaining the Soldiers and Sailors Civil Relief Act was to be reprinted, and that the work was already under way.

The House then voted to continue the committee.

Upon the Secretary's motion, the House then voted to adopt a resolution continuing the Committee on Court of Claims.

William W. Evans, of New Jersey, gave the report of the Committee on State Legislation. He said that three uniform acts—Common Trust Fund, Trust Receipts, and Appointment of Commissioners—had been adopted by the Mississippi legislature during the year, that South Carolina had adopted the Uniform Divorce Recognition Act and the Uniform Partnership Act, and that South Dakota, by rule of court, had made effective the Uniform Photographic Copies of Business and Public Records as Evidence Act. There will be legislative sessions in most states, next year, he said, and the Uniform Commissioners, under the auspices of the Vice Chairman, George Gleason Bogert, are conducting a survey for the purpose of determining what acts can be passed.

Charles S. Rhyne, of the District of Columbia, then reported for the Committee on Picketing of Courts. He said that Section 31 of the new Internal Security Act (the so-called Communist Control Act) just passed by Congress forbade the picketing of federal courts under penalty of $5000 fine or one year in prison or both. The language of the section was almost identical with that of the resolution passed by the House of Delegates last February, Mr. Rhyne said, and the committee's work was completed. He said that he thought that the committee should be continued, however, in case the Internal Security Act was not passed over the expected presidential veto.

Mr. Willy, for the Committee on Rules and Calendar, then moved that the following be adopted:

> Be it resolved, That the Board of Governors be authorized to continue such Special Committees now in existence as have not heretofore been continued by action of the House as in their judgment may be needed or necessary for the work of the Association.

The resolution was put to a vote and carried.

George Maurice Morris, of the District of Columbia, then reported on the International Bar Association to the House.

He had recently returned, he said, from a visit to the lawyers of fifteen countries as representative of the International Bar Association. He had been impressed, he declared, with the ease with which lawyers of any nation or group of nations can agree when they are not speaking for their respective governments. Lawyers everywhere are recognizable, he said, for the first thing they want to know is, what are the facts? and the second is what is the rule which for the general benefit of society should be applied to the facts which are now before us? He mentioned some of the work of the Inter-American Bar Association and said that it was working for uniformity of the laws that pertain to the doing of international business in the hemisphere, and it is hoped that a process has been begun that will last for centuries. He had no resolution to present, he

said, but the international bar organizations had a great potentiality, and the members of the House should be congratulated on their initial decision to join these organizations.

The House then voted to recess at 3:45 P.M.

SIXTH SESSION

■ At this final session, the House voted to approve four new Uniform Acts. It adopted resolutions already passed by the Assembly approving the Internal Security Act, calling for the extension of privately supported legal aid facilities and approving a requirement of non-Communist affidavits of members of the Bars of the various states.

■ The House convened for its sixth and final session at 10:00 A. M. on Friday, September 22.

Howard L. Barkdull, of Ohio, gave the report of the National Conference of Commissioners on Uniform State Laws, which met in Washington during the week preceding the Annual Meeting of the Association. The Commissioners had adopted four new uniform acts during their sessions, he said.

The first was the Uniform Reciprocal Enforcement of Support Act, under which there would be a reciprocal arrangement between two states, whereby the jurisdiction of the defendant or his property is obtained and an order of support is issued in one state, and then a recognizance is furnished in some form, cash or bond, assuring payment of the support.

The second was the Uniform Marriage License Application Act, he said, which provides that before a marriage license application is accepted, the applicants must have submitted to a standard laboratory blood test and a certified statement to the effect that the applicants are not infected with syphilis in the state of that disease in which it can be transmitted to another.

The third was the Uniform Prenatal Blood Test Act, which requires a similar standard laboratory blood test for syphilis before the birth of a child and in no event later than thirty days after the first attendance by the physician upon the pregnant woman.

The fourth was the Uniform Probate of Foreign Wills Act, under which the will of a testator who is domiciled outside the state shall be admitted to probate on proof that his will is probated in the jurisdiction where the testator was domiciled at death and is not being contested there. Mr. Barkdull then moved that the House approve the four uniform acts and the motion carried.

Orie L. Phillips, of Colorado, then gave the report of the Survey of the Legal Profession. He called the attention of the House to the Third Progress Report of the Survey by its Director, Reginald Heber Smith of Boston, which was printed in the September issue of the JOURNAL. He said that the Survey was now reaching the point where the emphasis shifts from research, report and recommendations, which is the Survey's task, to positive action to accomplish needed reforms, which will be the responsibility of other agencies, primarily of the Association itself.

House Concurs with Assembly on Four Resolutions

Secretary Stecher then reported that eighteen resolutions had been introduced in the Assembly. Four of these were adopted, he said, and these would require action by the House.

The first of the four adopted by the Assembly was submitted by Edward W. Allen, of Washington. It reads as follows:

BE IT RESOLVED, That the President of the American Bar Association appoint a special committee to study communist tactics, strategy and objectives, particularly as they relate to the obstruction of proper court procedure and law enforcement, and that the committee appointed by the President of the Association devise and recommend appropriate steps to be taken to carry out its objectives, and that the committee be authorized to cooperate with other loyal American organizations in the performance of the duties imposed by this resolution.

On Mr. Stecher's motion, the House voted to adopt this resolution.

The next resolution was introduced by Robert K. Bell, of New Jersey. It was as follows:

WHEREAS, A society based upon American ideals postulates as one of its goals the achievement of equal justice for all; and

WHEREAS, The achievement of such a goal is the responsibility of all members of society, which they should bear consciously, voluntarily and directly, and should not shift to the government; and

WHEREAS, Equal justice for all implies the availability of the services of lawyers to all citizens, regardless of their financial means; and

WHEREAS, Legal aid or the providing of free legal advice or representation to the indigent is an essential service entitled to the support of all members of the community; and

WHEREAS, Legal aid can be provided only by the legal profession, preferably with the cooperation and assistance of social and welfare agencies; and

WHEREAS, The legal profession must be free and independent if it is to serve both its clients and society to the full; and

WHEREAS, The legal profession will not be free and independent if it is dependent upon government handouts or subsidies; and

WHEREAS, The existence of the National Legal Aid Association and the ever-increasing number of privately financed local legal aid societies throughout the country, provide a solid basis of experience and organization for administering legal aid without governmental intervention; now therefore, be it

RESOLVED, That it is the primary responsibility of the legal profession, as part of its high tradition of service to the public, as an expression of its devotion to the ideal of equal justice for all and in order to forestall the threat to individual freedom implicit in growing efforts to socialize the legal profession, to assume, through its bar associations and in conjunction with other social and welfare agencies, the leadership in establishing and maintaining adequate organized legal aid

facilities in all parts of the country;

That legal aid facilities should be established and maintained so far as possible as a privately supported community service and, in any event, without governmental control or influence over their operations.

John T. Barker, of Missouri, said that much of the need for legal aid comes from the laziness of the lawyer, for it was lawyers' refusing to represent poor people that has resulted in the establishment of legal aid societies. If every large office would designate one man to represent the poor and the unfortunate who do not have the money to hire lawyers, he said, it would establish a great deal of good will for the Bar throughout the country. He does not doubt that there is need for legal aid societies, he said, but it is the fault of the lawyers that the need is there. The administration of justice belongs to the lawyers, not the courts, he said, and when the lawyers fell down and failed to do what they should have done, then the judges had to take over. He suggested that the committee set up by the resolution, work out some plan for furnishing, from the law offices in America, in conjunction with Legal Aid Associations, representation to individual clients.

The House then voted to adopt the resolution.

The third resolution approved by the Assembly was submitted by Albert P. Jones, Robert G. Storey, Gordon Simpson, S. Allen Crowley and Paul Carrington, all of Texas. It was as follows:

WHEREAS, lawyers, better than any other group in America can understand and teach others to understand the principles of our Constitution and the protections afforded by our Bill of Rights, and the fundamental conflicts between these constitutional principles and the doctrines of Communism; and

WHEREAS, The lawyers of America, by virtue of the license each has obtained to practice law, to serve courts of justice, and to advise citizens as to their legal rights, have a much greater duty than citizens generally to support the principles of the Constitution and oppose the doctrines of Communism inconsistent therewith; now therefore be it

RESOLVED, By the American Bar Association:

1. That it is not inappropriate, with world conditions as they are, that any American citizen be required to attest to his loyalty to our form of government by anticommunist oath, and that it is especially appropriate that all licensed to practice law in the United States of America be required so to do;

2. (a) That the legislature, the court or other appropriate authority of each state or territory and the District of Columbia, be requested to require each member of its Bar, within a reasonable time and periodically thereafter, to file an affidavit stating whether he is or ever has been a member of the Communist Party or affiliated therewith, and stating also whether he is or ever has been a member or supporter of any organization that espouses the overthrow by force or by any illegal or unconstitutional means, of the United States Government, or the government of any of the states or territories of the United States; and in the event such affidavit reveals that he is or ever has been a member of said Communist Party, or of any such organization, that the appropriate authority promptly and thoroughly investigate the activities and conduct of said member of the Bar to determine his fitness for continuance as an attorney;

(b) That in the event at any time later it be established that said attorney has wilfully sworn falsely to any of the facts, he should be the subject of immediate disbarment proceedings.

The House voted to adopt the resolution without debate.

The last resolution already approved by the Assembly was this:

WHEREAS, The Congress has before it the Conference Report on H.R. 9490, which Conference Report contains the complete text of the proposed Internal Security Act of 1950; and

WHEREAS, world conditions and the objectives as set forth in the bill require the prompt enactment of legislation for the security of the Nation; therefore be it

RESOLVED, By the American Bar Association, in annual meeting assembled in the City of Washington that:

(1) The Congress is urged to pass H.R. 9490 as contained in the Conference Report submitted to the Senate and House of Representatives; and

(2) That, if the Congress passes said Bill, the President of the United States is urged to approve and sign the same.

The House voted to adopt the resolution, and, on motion of Mr. Baldwin, of Louisiana, voted that it be transmitted to the President of the United States without delay.

On motion of Secretary Stecher, the House voted to extend appreciation to the members of the District of Columbia Bar, the hosts at the meeting.

George Maurice Morris, of the District of Columbia, moved that the Committee on Scope and Correlation of Work be authorized and directed to make a study and report to the House on the Association's organization for handling public relations. He said that the Association now had half a dozen committees that dealt with various aspects of public relations, and that this created confusion at times because laymen would be approached by one body within the organization and then by another. There is an enormous overlapping of activity and of time, he said. All the present bodies are doing good and necessary work, he declared, but there should be a "marriage and a control and a simplification of the whole operation if we are to get the best results".

Mr. Morris' motion carried.

Chairman of the House Morford then turned the gavel over to his successor, Roy E. Willy of South Dakota, and the House voted to adjourn *sine die* at 10:40 A. M.

"Books for Lawyers"

(Continued from page 925)

Publication Act of 1893 was abandoned in the Statutory Instruments Act of 1946.[21] The only practical solution to the problem, according to Mrs. Sieghart, is the increase of judicial control.[22]

The second part of the book, "The History of the Ordinance in France", deserves careful reading by the American lawyer because of its revelation of the devices resorted to in France for the protection of the citizen. The lawyer may be surprised to learn, for example, that the possibility of annulment of an administrative decision by the Council of State goes beyond mere *ultra vires* because beyond the competence of the agency or because violative of prescribed forms. The Council of State annulled a decision of the Minister of War which excluded a grain dealer from competency to contract with the war office because he held political and religious opinions of which the Minister disapproved.[23] But in France as in England a transfer of legislative power to the Executive has taken place on such a scale as to institute the Government as a second legislature. "This tendency of equipping the Executive with *pleins pouvoirs* over almost the whole field of its activity constitutes a serious threat to the continued existence of democratic government. . . . Potential dictatorial powers are . . . created by infiltration under the cloak of the Constitution."[24]

The danger of infiltration is immensely increased both in England and the United States by the increased power of the Executive.

As to England if we have in our minds our schooldays' idea that Parliament is sovereign in the sense that the members of the House of Commons control the Executive, a heritage of the Glorious Revolution, we are mistaken. For we lose sight of the fact that the cabinet is not merely a committee of the House, that the cabinet because of its leadership or control of the party, through its whips and its party discipline and the decline of time or opportunity for private member's bills, controls the members of the majority party to a large extent. And we must not forget the reluctance of a member of the majority to vote against the cabinet if there is danger of its defeat in an important division. For if that occurs and dissolution, the member faces the great expense and the danger of being unseated at the election he has helped to bring about.

So great indeed is the power of the cabinet that it is authoritatively argued that the Ministers of the Crown are not "subordinate" to Parliament. On the contrary, "Parliament and the Executive must be regarded as two interrelated organs of the Constitution, charged with differing functions, neither having any inherent supremacy over the other."[25] "The cabinet is not best described as a 'connecting link' between two bodies. It is, more accurately, the centre from which radiate both government department and parliament."[26] And "Parliament does not in fact appoint, create or constitute the Cabinet."[27] There is the view that "once the government is established neither the people nor Parliament rules . . . . In the sphere of administrative *action*, the government is independent of Parliament".[28] So Lloyd George is quoted: "Parliament has really no control over the Executive; it is a pure fiction."[29] Indeed "Legislation is in part . . . a function of the Executive rather than the Legislative, subject to the duty of the latter to consider, criticise, and defend and its right to approve or reject. It is a governmental duty to conceive, examine, discuss and draft legislative proposals . . . . The Executive governs."[30] And as to who governs in the United States there can be no doubt of the great shift of power from Congress to the Executive.[31]

Of course if one believes that the Executive, because of popular mandate, can do no wrong, that congressmen are incompetent "politicians" who waste time by talking and should sign on the dotted line legislation proposed by the Executive, such a one will not be interested in the book

21. Pages 136-137.
22. Page 148.
23. Pages 217, 221-222.
24. Page 307.
25. Griffith, cited in note 13 *supra* at 1079.
26. *Id.* at 1085.
27. *Id.* at 1090.
28. A view stated *id.* at 1092.
29. *Id.* at 1100.
30. Pages 1111, 1117. On cabinet power over Parliament see the book under review at pages 65 and 142 and L. S. Amery, *Thoughts on the Constitution* (Oxford 1947). On safeguards see R. C. Fitzgerald, 27 *Can. Bar Rev.* 550-574 (1949); Walter Gellhorn, *Administrative Law* (2d Ed. Brooklyn, 1947) 151-158. That public administration *is* policy making see Paul H. Appleby, *Policy and Administration* (Univ. of Ala., 1949).
31. See for example C. Perry Patterson, *Presidential Government in the United States* (Chapel Hill 1947); *The Presidency in Transition*, ed. by Robert S. Rankin (Gainesville, Fla., 1949); Harold J. Laski, *The American Democracy* (New York, 1948) 72-77 and *The American Presidency* (London, 1940) *passim* and at 32-36, 48, 70, 242-245, 254, 271. Edward S. Corwin, *The President* (3d Ed. New York 1948) 34-38, 353-357, 371-372. For a detailed study of recent legislation as to the relative contributions of President and Congress, giving much credit to Congress but referring to the emergence of the Chief Executive as a force in the initiation and formulation of twentieth century legislation, see Lawrence H. Chamberlain, *The President, Congress and Legislation* (New York, 1946).

under review nor in any attempt at safeguarding control over administrative agencies. If one makes efficiency his god and believes in the rule of the so-called "expert"[32] he will not approve *Government by Decree.* Nor will he if he has forgotten the long and bloody struggle of the English people to control their King which eventuated in Magna Charta and the Bill of Rights and the Petition of Right, or the centuries of blood and toil that led through Coke[33] and Marshall to an independent judiciary and judicial review of unconstitutional law and administrative conduct.

One also may not fear any subtle drift if he has already forgotten that totalitarian states are based upon the concentration of governmental powers in the executive.[34]

So also if one agrees with an English writer that the doctrine of separation of powers is "that antique and rickety chariot . . . so long the favourite vehicle of writers on political science and constitutional law, the conveyance of fallacious ideas",[35] such a one will not be concerned about the dangers of administrative tyranny. Or he may agree with Rexford Tugwell that "The separation of governmental powers had nothing to do with the protection of civil liberties . . . . When the separation of powers is spoken of as a precious principle, therefore, it must be taken to be precious for some other reason than that the liberties of common folk are protected by it."[36] Or perhaps he may applaud to the echo the words of Henry Russell Spencer of Ohio State University in his presidential address to the American Political Science Association in 1948. He referred to the words "a government of laws, not of men" in Harrington and the Massachusetts Constitution of 1780 as "intellectual insincerities" as did a previous president of the Association in 1927. "What would Harrington and the men of Massachusetts think", asks Professor Spencer, "could they see a twentieth-century's fetich worship of that famous phrase? It is now used to justify a business civilization that defies government, calls government communistic, regards government as divinely commanded to play a negative role to keep its hands off; requires that government be not by law nor by men but by mere attorneys, 'business lawyers' who have not learned to be men, certainly not to be statesmen."[37]

If beauty, like a dial-hand, can steal from the figure of a loved one, and no pace perceived, so also can it steal from a constitution conceived in liberty and fondly dedicated to the hope that its safeguards would be preserved for and by appreciative and vigilant future generations of free men. But institutions do not stay put, especially in a dynamic era. Indeed that is the essence of revolution, silent, signalized by the fall of no visible Bastille. Though change, if not destructive of liberty, be necessary and desirable, the danger comes when no pace is perceived. Our perception may be lacking because changeless constitutional form may cloak the reality of change. The cloaking may be intentional as in the preservation of republican forms by an Augustus or Napoleon. Or it may be, as in the case of royal power in England, that the stately edifice has been gradually hollowed out from within until it is little more than an empty shell.

It is the responsibility of men of intelligence constantly to scrutinize the institutions in which they believe lest there be shifts of power unperceived, shifts destructive of liberty. This is a necessary realism. And "We must never forget that apparent legality is a characteristic of the modern form of totalitarianism and that it is therefore of the utmost importance not to provide the tools which could be used for such a purpose."[38]

BEN W. PALMER

Minneapolis, Minnesota

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32. Even Laski made a forceful argument against turning policy making over to the expert. See his "The Limitations of the Expert", 162 *Harper's Magazine* 101 (1930). For an excellent article see William J. Butler, "The Rising Tide of Expertise", *Fordham L. Rev.* (March 1946).

33. For Coke's denial of the King's right to make law by proclamation see Taswell-Langmead, *English Constitutional History* (9th Ed. Boston, 1929) 468-470; 2 S. R. Gardiner, *History of England* (3d Ed. London, 1889) 86, 104; Lyon and Block, Edward Coke (Boston, 1929) 187. On Henry VIII and Elizabeth, see 2 Hannis Taylor, *Origin and Growth of the English Constitution* (Boston, 1898) 179-180.

34. "The executive has become de jure and de facto the sum of all powers". Sturzo, "The Totalitarian State", 3 *Social Research* 222, 231 (1936). "The Führer is chief of the entire machinery of administration—exercises the entire powers of the . . . Reichstag . . . is the Supreme Judge of the German Reich and people". Hans Frank, *Recht und Verwaltung* (1939) 9-16. "No distinction is made between the exercise of power that elsewhere would be called legislation and that which would be deemed administration". 1 Webb and Webb, *Soviet Communism: A New Civilization.* (Rev. ed. 1938) 4. "Legislative, judicial and executive powers have been vested in the Presidium (a body of 37) which" not only finally interprets the laws even to make them retroactive but has the power to "issue decrees". Brecht, "The New Russian Constitution", 4 *Social Research* 157-185 (1937).

35. W. A. Robson, *Justice and Administrative Law* (2d ed. 1947) 14, quoted in book under review at page 311.

36. 7 *Journal of Social Philosophy* 5-34 (1941). So James M. Landis, "A pragmatic approach to government would judge by the tests of efficiency in promoting the objectives of regulation, and of the disposition of controversies along broad lines of justice and right, rather than by conformance to a page of theory in Montesquieu." Gellhorn; *op. cit.* at 5. "National-socialist writers . . . deny the validity of the doctrine for the very reason that democrats maintain it, that it imposes limitations on the action of the State". Jennings, *op. cit.* at 260. So too Professor Charles H. McIlwain: "Among all the modern fallacies that have obscured the true meaning of constitutional history, few are worse than the extreme doctrine of the separation of powers and the indiscriminate use of the phrase 'checks and balances' . . . the independence of judges has nothing to do with separation. . . . Political balances have no institutional background whatever except in the imaginations of closet philosophers like Montesquieu". *Constitutionalism, Ancient and Modern* (Ithaca, 1947) 141-142.

37. 43 *Am. Pol. Sci. Rev.* 7 (1949). I cite without comment as to the phrase, Fritz Morstein Marx of the Bureau of the Budget, "Administrative Ethics and the Rule of Law", 43 *Am. Pol. Sci. Rev.* 1119 at 1128-1129 (1949). For President Munro's address, see 22 *Am. Pol. Sci. Rev.* 1-11. So also another president of the American Political Science Association, Charles Grove Haines of the University of California, discussed separation of powers and said "Because of the presumed threat to the monopoly as to the application and interrelation of the law which many lawyers and judges think is rightfully theirs, a widespread and energetically directed attack is being made on the present trends and tendencies in administrative justice". 34 *Am. Pol. Sci. Rev.* 1-30 (1940). It is not surprising that he testified in favor of the court-packing bill, Hearings Before the Committee on the Judiciary of the Senate, 75th Congress, 1st Session (1937) part 2, pages 335-378. For change in textbooks from praise of separation of powers to criticism see H. Arnold Bennett, *The Constitution in School and College* (New York, 1935) 60, 68, 69, 80-82, 99, 158, 162, 199, 200. On separation of powers see 4 *Selected Essays on Constitutional Law* (Chicago, 1938) 168-217.

38. Page 307.

Our Younger Lawyers
(Continued from page 943)

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The committee formed as an experiment has progressed in the first few months through the cooperation and financial assistance of the state and local bar associations much farther than had been expected at its inception. It is hoped that through similar help all of the state surveys will be completed in time to be made a part of the Survey of the Legal Profession being conducted by its director, Reginald Heber Smith of Boston. (see 36 A.B.A.J., 727-730, Division V.; September, 1950.)

Japanese Court Mission
(Continued from page 918)

New York City, The United Nations League of Lawyers and the National Press Club in Washington have been encouraged to arrange afternoon or evening social affairs at which the group will be guests with perhaps the Chief Justice responding to greetings by the president of the host organizations. Luncheons with judges whose courts are observed by the group have been arranged in order that the group may meet and converse informally with the judiciary. Apart from such semi-official luncheons, informal entertainment by individuals or organizations in the American communities visited has been given every encouragement. However, any attempt by organizations interested in influencing legislation or representing special interests to use the group as a mask for propagandizing any particular policy will be reject.

It is hoped that by this program the mission will realize first, that a democratic judicial system can proceed speedily and successfully administer justice and, second, that it can do this with the utmost efficiency and at reasonable cost in money and energy. The reformation and reorientation of Japanese jurisprudence toward democratic ideals must expand into efforts to improve, not only the system and the methods of Japanese justice, but also the personnel of the judiciary. Before this group finishes its mission here, it will be necessary to determine the appropriate stages in its study of American judicial administration at which to test the Japanese on their assimilation of the democratic viewpoint and to make certain the group takes back with it a clear and unequivocal democratic concept of equal justice under law.

To achieve this, the group must absorb in thought and principle the American system by being exposed to and inhaling as much of the federal and state judicial atmosphere as possible. The success of the Japanese Supreme Court Mission will be measured by the initiative shown by this group upon their return to Japan in seeking to improve the caliber of the judges and the confidence of the Japanese people in their newly constituted country.

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